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No. ____

In the Supreme Court of the United States October Term, 1994

WILLIAM L. BALL; ROGER MANNHALTER; JOHN J. HOWE, JR.,

Petitioners,

v.

JOHN R. GASHO, SR.; SHARON L. GASHO,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Harlow v. Fitzgerald*, 475 U.S. 800 (1982), this Court held that qualified immunity in a constitutional tort action against government officials is to be determined solely on an objective standard of reasonableness based upon clearly established constitutional law and rejected any inquiry into the subjective motivations of the government officials. In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court held that clearly established constitutional law cannot be merely generalized standards, but must be particularized so that reasonable officers could be aware of whether their conduct complies with the relevant constitutional standards. The Ninth Circuit below did not focus upon constitutional law relating to whether an officer can effect an arrest for probable cause when individuals fail to return property taken from a seized vehicle, *i.e.*, an aircraft. Instead, the Ninth Circuit, denying the officers summary judgment on qualified immunity, held that allegations of malicious intent in effecting an arrest were relevant in determining that the clearly established constitutional law prohibits an arrest for challenging an officer's authority on freedom of speech grounds. The case therefore presents the following questions:

1. Are allegations of malicious intent relevant in determining whether law enforcement officials are entitled to qualified immunity?

2. Can the "clearly established" constitutional law used to defeat qualified immunity be based upon generalized constitutional principles governing arrests for challenging an officer's authority solely because an allegation of malicious intent is made?

PARTIES TO THE PROCEEDINGS

Petitioners are William L. Ball, Roger Mannhalter, and John J. Howe, Jr., agents of the United States Customs Service. During the time at issue, all petitioners were located in the Phoenix, Arizona office of the United States Customs Service. Petitioners Ball and Mannhalter were special agents, and Petitioner Howe was the immediate supervisor of Petitioners Ball and Mannhalter. Each Petitioner appears here in their individual capacities.

Respondents are John R. Gasho, Sr. and Sharon L. Gasho, private citizens. During the times at issue, Respondents were residents of the State of Arizona. Millardair, Ltd., a Canadian corporation ("Millardair"), was also a plaintiff in the action below; however, Millardair is not a party to this petition because its claims were dismissed by the District Court and affirmed on appeal.[1] In addition, this petition does not include all parties to the United States Court of Appeals for the Ninth Circuit decision because the instant proceeding was consolidated with a prior Federal Tort Claims Act ("FTCA") action by the Gashos and Millardair against the United States of America. Thus, the United States is not a party to this petition.[2]

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[1]Notice as required by Rule 12.4, Rules of the Supreme Court of the United States, has been given to Millardair.

[2]In addition, Northrup Worldwide Aircraft Services, Inc. ("Northrup") was a defendant in the FTCA action in a claim by Millardair. The claim against Northrup was not appealed by Millardair. Thus, Northrup is not a party to this petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioners William L. Ball, Roger Mannhalter and John J. Howe, Jr. pray that a writ of certiorari be issued to review the opinion, entered in this proceeding on November 2, 1994, and the judgment, entered in this proceeding on January 13, 1995, of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, entered on November 2, 1994, is reported at 39 F.3d 1420 (9th Cir. 1994) and is reprinted in the Appendix ("App.") "A", *infra*. The Order of the United States Court of Appeals for the Ninth Circuit denying rehearing, filed December 27, 1994, is unreported and is reprinted in App. "G." The Order of the United States District Court from which appeal was taken is unreported and is reprinted in App. "C." The final judgment of the

United States District Court is unreported and is reprinted in App "B." The judgment of the United States Court of Appeals for the Ninth Circuit, filed January 11, 1995, is unreported and is reprinted in App. "H." In addition, two of the orders of the United States District Court entered in the FTCA action are unreported and reprinted in Apps. "E" and "F". The Amended Judgment of the United States District Court in the FTCA action is reprinted in App. "D."

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on November 2, 1994. A petition for rehearing was denied on December 27, 1994. On January 13, 1995, the United States Court of Appeals for the Ninth Circuit filed its judgment. On March 20, 1995, Justice O'Connor extended the time for filing a petition for writ of certiorari for 30 days to April 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18, Section 2232(a) of the United States Code provides:

(a) Physical interference with search.

Whoever, before, during or after seizure of any property by any person authorized to make searches and seizures, in order to prevent the seizure or securing of any goods, wares, or merchandise by such person, staves, breaks, throws overboard, destroys, or removes the same, shall be

fined under this title or imprisoned not more than five years, or both.

STATEMENT

1. **Factual Statement**. On June 24, 1988, John and Sharon Gasho flew a McDonnell Douglas DC-3 aircraft to the Scottsdale Municipal Airport. Later that same day, Fred Arthur, an Air Traffic Control Specialist employed at the tower at the Scottsdale Municipal Airport, notified the United States Customs Service that the aircraft had arrived several hours earlier displaying United States registration markings, which were subsequently replaced with Canadian registration markings.

Because the McDonnell Douglas DC-3 has a notorious history as an aircraft used in smuggling contraband across the United States' border with Mexico, the Customs Service Resident-Agent-in-Charge ("RAC") in Phoenix, William Gately, dispatched Special Agents William Ball and Roger Mannhalter to the airport to investigate. While en route to the airport, Agent Ball was notified that the Canadian authorities reported that the Canadian registration markings on the aircraft were invalid.[5] After a brief investigation at the airport, Agents Ball and Mannhalter learned that the Gashos piloted the DC-3 aircraft. Agents Ball and Mannhalter then traced the Gashos to a Scottsdale hotel.

The Gashos are owners of an aircraft restoration company located in Tucson, Arizona. Both John and Sharon Gasho are pilots. During the initial interview of the Gashos at their hotel by Agents Ball and Mannhalter, the Gashos

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[5] RAC Gately also telephoned Corporal Karol Waversfeld, an acquaintance with the Royal Canadian Mounted Police, to determine whether the Canadian registration marks displayed on the aircraft were properly issued to the aircraft. A dispute in the record existed as to when Waversfeld returned Custom's call regarding the invalidity of the Canadian registration.

stated that the aircraft belonged to Carl Millard,[4] who provided the Canadian registration marks displayed on the aircraft. The Gashos claimed that they had relied upon Millard to obtain the proper Canadian registration markings and that they had no personal involvement in the process. The Gashos claimed that Millard had purchased the aircraft for export to Canada and that they were hired by Millard to prepare the aircraft for export. The Gashos also told the Agents that they flew the aircraft to Scottsdale Municipal Airport at Millard's request in order to secure all necessary export documentation from John Zarcone of the Federal Aviation Administration Flight Standards Office. They claimed that Zarcone had issued the required documentation and assisted them in the placement of the Canadian registration markings on the aircraft.

John Gasho also discussed the ownership history of the aircraft with the Agents, claiming that he held ownership of the aircraft for a substantial period "on paper", but that Millard was the true owner of the aircraft during that period. Mr. Gasho explained that Millard transferred ownership to him "on paper" in order to obtain United States registration markings for the aircraft, which Mr. Gasho had determined could not be legally issued to Millard because he was not a citizen of the United States. Mr. Gasho maintained that he transferred ownership of the aircraft back to Millard after the Gashos prepared the aircraft for export to Millard in Canada and after Millard provided Canadian registration markings for the aircraft. Following Agents Ball and Mannhalter's interview of the Gashos, the Agents attempted to contact Zarcone, but were unsuccessful because the Flight Standards Office was closed and Zarcone's home telephone number was unlisted.[5]

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[4] Carl Millard is the owner of Millardair.

[5] Agents Ball and Mannhalter also attempted to contact two Customs Service employees, Ken Batyl and Dave Kuntz, whom

[cont'd]

Based upon the totality of evidence known by Agents Ball and Mannhalter at the time, they concluded that there was probable cause to believe the aircraft was displaying false registration markings and therefore decided to seize the aircraft. Agent Ball so notified the Gashos, requested that they provide sworn statements, and informed them of their *Miranda* rights.

The Gashos responded by summoning their attorney, Pamela Vining,[6] to the hotel. When Vining arrived, Agent Ball informed her that he intended to return to the Scottsdale Municipal Airport to seize the aircraft on behalf of the Customs Service. The Agents then departed together in their car, and the Gashos and Vining followed in Vining's car.

At the airport, the Gashos showed the agents an Export Certificate of Airworthiness and a Special Flight Authorization signed by Zarcone for the aircraft, which identified the aircraft by the Canadian registration markings displayed on the aircraft. Neither document indicated, however, that the Canadian registration markings were properly issued to the aircraft by the Canadian Ministry of Transport. The Special Flight Authorization instead required the owner of the aircraft to ensure that display of the listed markings was "in accordance with . . . [the foreign] country's applicable requirements." This information confirmed the Agents' deci-

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John Gasho claimed would vouch for his trustworthiness. Kuntz was unavailable, but Batyl was located by telephone. Batyl informed Agent Ball in substance that John Gasho had cooperated in other Customs Service investigations and that Batyl did not believe Mr. Gasho was guilty of any criminal conduct. Kuntz is the customs' employee who allegedly had a conversation with Agent in Charge John Howe the next day. Kuntz contended that Agent Howe told him that the Gashos were arrested for failure to return the logbooks and because they made the Agents mad.

[6] Vining is John Gasho's daughter.

sion to seize the aircraft. The Agents therefore informed the Gashos that they were seizing the aircraft.[7]

Realizing that the aircraft was seized, Sharon Gasho requested permission to remove personal belongings and a radio from the aircraft. Agent Ball granted Sharon Gasho's request. After Sharon Gasho exited the plane, the Agents overheard Sharon Gasho tell John Gasho that she had taken the aircraft logbooks from the aircraft. The Agents then explained to the Gashos and to Vining that the seizure of the aircraft included the aircraft's logbooks, and ordered that the logbooks be immediately returned.[8] The Gashos were evasive about whether they in fact had the logbooks[9] and refused to return the logbooks and, instead, proceeded

[7] When it became apparent that the Agents' concerns were not resolved by the documentation provided from the aircraft, John Gasho became extremely hostile and uncooperative. He threatened Agents Ball and Mannhalter with suit and told them that they would be "walking a beat" before he was through with them. He even spoke arrogantly of drug smuggling, stating that it would be unnecessary for him "to haul a load of marijuana [because] he could retire from what was going on there that night."

[8] The Ninth Circuit's conclusion that "the agents did not protest or attempt to stop Sharon Gasho from removing the logbooks and placing them in the vehicle," *Gasho*, 39 F.3d at 1426, is rebutted by deposition testimony taken in the prior FTCA action against the United States, which establishes that the Agents immediately demanded return of the logbooks. (A copy of the pertinent deposition testimony is found at App. "K.")

In fact, because these depositions took place in the prior FTCA action against the United States, the Gashos alleged the following in their *Bivens* complaint against the Agents:

> Upon being advised that Plaintiffs had removed the aircraft maintenance logs, Agent Mannhalter became extremely aggressive, demanded return of all aircraft logs and threatened arrest and incarceration.

[9] A copy of pertinent portions of John and Sharon Gasho's deposition testimony is found at App. "L."

into the Scottsdale Aviation Center and telephoned the Scottsdale police.

While waiting for the Scottsdale police, Agent Ball again ordered the Gashos to immediately return the logbooks and warned that they would be arrested for removing seized property to prevent seizure if they refused. The Gashos ignored the warning and again refused to return the logbooks. After the Scottsdale police officers arrived at the airport and Agent Ball again warned the Gashos that they would be arrested if they failed to relinquish the logbooks, Vining requested an opportunity to speak with the Gashos alone. Her request was granted, and she was allowed the use of a vacant office in the airport.

Agent Ball subsequently went back to the office to determine whether the Gashos would produce the logbooks. The Gashos and Vining refused to open the office door, requiring Agent Ball to obtain a key from the customer service desk to enter the room. Agents Ball and Mannhalter informed the Gashos shortly after entering the office that they were under arrest for removal of the logbooks from the aircraft.[10] Vining then retrieved the logbooks from her car and gave them to the Customs Agents. The Scottsdale police officers assisted Agents Ball and Mannhalter in taking the Gashos into custody and transporting them to the Maricopa County Jail. The Gashos were booked and released after approximately two hours.

Subsequent investigation by Agent Ball revealed that the Canadian registration markings displayed on the aircraft were reported as invalid by the Canadian Ministry of Transport because Millard had not completed all of the required paperwork. Millard filed the necessary paperwork in Canada several weeks later and petitioned the Customs Service for return of the aircraft. The Custom Service released the aircraft to Millard approximately six months later. The

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[10] Agents Ball and Mannhalter had been in contact with Agent Howe at various times, and Agent Howe ordered the arrests of John and Sharon Gasho.

Customs Service also prepared and forwarded an investigative report to the United States Attorney in Phoenix recommending that the Gashos be criminally prosecuted for removing the logbooks from the aircraft to avoid seizure. The United States Attorney declined prosecution.

2. **FTCA District Court Action.** On December 19, 1989, John and Sharon Gasho filed suit against the United States in the United States District Court for the District of Arizona under the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680, for false arrest, false imprisonment, intentional infliction of emotional distress, and abuse of process based upon their arrests and the seizure and detention of the aircraft.[11] Millardair joined as plaintiff in that suit on the abuse of process claim based upon the seizure and detention of the aircraft.[12] The District Court dismissed plaintiffs' claims in their entirety by orders of July 29, 1991, March 25, 1992, and September 1, 1992, and entered a final judgment on September 1, 1992 and an amended final judgment on November 2, 1992. The Gashos appealed the judgment to the United States Court of Appeals for the Ninth Circuit.

3. ***Bivens* District Court Action.** On June 24, 1992, the Gashos and Millardair filed a suit under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), against Agents Ball, Mannhalter and Howe. The District Court dismissed the action as barred by 28 U.S.C. § 2676 which bars a *Bivens* action after a judgment has been entered in an FTCA action. The Gashos and Millard appealed to the United States Court of Appeals for the Ninth Circuit.

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[11] The Gashos also named Agents Ball and Mannhalter as defendants in the FTCA action; however, the claims were dismissed on August 15, 1990 pursuant to Rule 4(j), Federal Rules of Civil Procedure, because the Gashos failed to accomplish service within 120 days.

[12] Millardair also named Northrup as a defendant, and that claim was dismissed as well. Millardair did not appeal in the FTCA action.

4. **The Ninth Circuit Opinion.** The United States Court of Appeals for the Ninth Circuit consolidated the FTCA action appeal and the *Bivens* action appeal. The Ninth Circuit reversed in part and affirmed in part.[15] The Ninth Circuit first addressed the FTCA claims against the United States. Relevant to this petition, the court held that probable cause is an affirmative defense for false arrest and imprisonment claims under the FTCA and that the United States bears the burden of production and persuasion for this defense. *Gasho*, 39 F.3d at 1427. On reviewing summary judgment, the Ninth Circuit concluded that the United States had not shown probable cause because no evidence purportedly existed to show that the Gashos intended to steal the logbooks from Customs. *Id.* at 1430. The Ninth Circuit's standard for its holding was that "probable cause is lacking if the circumstances relied upon are 'susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities.' *United States v. Moore*, 483 F.2d 1361, 1363 (9th Cir. 1973) (quoting *United States v. Selby*, 407 F.2d 241, 243 (9th Cir. 1969))." *Id.* at 1432.

In addressing the claim for arrest in violation of the Fourth Amendment, the Ninth Circuit analyzed the qualified immunity claim and found that the important facts alleged by the Gashos related to the Agents' subjective intent:

> The Gashos produced evidence that Agent John Howe, who ordered the arrests, later told another Customs official that the Gashos were arrested because the Gashos' refusal to turn over the logbooks 'made us mad.'

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[15] The Ninth Circuit affirmed all claims in both actions relating to seizure of the aircraft. This issue is not involved in this petition. In reviewing the *Bivens* action, the court, pursuant to 28 U.S.C. § 2676, upheld the District Court's dismissal of the Gashos' claims to the extent any claims were based on seizure of the aircraft because the court affirmed the District Court's judgment for the United States on all claims relating to seizure of the aircraft.

Id. at 1438. Focusing upon the Gashos' allegations of the Agent's subjective intent, the Ninth Circuit relied solely on general and irrelevant principles of constitutional law in concluding that "[i]t is clearly established that a person's Fourth Amendment rights are violated if the sole basis for his arrest is his challenge to the officer's authority absent a warrant." *Id.* at 1439. The Ninth Circuit then purported to examine the objective reasonableness test applicable to issues of qualified immunity under the decisions of this Court. The Ninth Circuit concluded that "a reasonable officer would have known that the arrests were without probable cause" because "[t]heir belief was based on mere supposition."[14] *Id.*

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ninth Circuit's decision is inconsistent with and directly contrary to rulings of the United States Supreme Court on qualified immunity. First, contrary to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Ninth Circuit held that the subjective motivations of the agents will defeat a claim of qualified immunity. Second, contrary to *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Elder v. Holloway*, 114 S.Ct. 1019 (1994), the Ninth Circuit also utilized general and irrelevant principles of constitutional law, as opposed to particularized and relevant constitutional law, in determining whether a constitutional violation is clearly established. Based on these errors, the court misapplied the objective test, which is the cornerstone of a qualified immunity analysis, and improperly focused on the irrelevant premise that an arrest based on a challenge to an officer's authority is rendered unconstitutional merely on the basis of an allegation of malicious intent. The Ninth Circuit's decision leaves no room for mistaken, but reasonable, arrests: the very essence of the protection offered by

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[14] On remand, the Gashos contend that the Ninth Circuit decided the issue of qualified immunity against the Agents as a matter of law. App. "J", *infra*.

qualified immunity. The Ninth Circuit's conclusion repudiates this Court's clear holdings on the issue of qualified immunity. The court's decision therefore upsets the careful balance struck in *Harlow*, which protects society's interest against unconstitutional government conduct while at the same time protecting government officials from unlimited liability for mistaken, but reasonable, judgments. The Ninth Circuit's opinion thereby threatens to inhibit all federal and state law enforcement officials in the performance of their duties and to subject them to civil liability for actions or decisions which to date have been protected, even if they were mistaken. Such a result is inconsistent with this Court's prior authority, and significantly erodes the protections heretofore provided by this Court's analysis of qualified immunity.

I. Certiorari Should be Granted to Correct the Ninth Circuit's Application of a Subjective Standard to Defeat a Qualified Immunity Defense.

In *Harlow*, this Court held that the subjective intent of federal officials alleged to have violated the constitutional rights of a plaintiff is irrelevant in determining whether the federal officials are entitled to qualified immunity. *Harlow*, 457 U.S. at pp. 817-818. Instead, the Court held that the proper inquiry is based on an objective standard: "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818; *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner."); *Anderson*, 483 U.S. at 641 (federal agents' "subjective beliefs about the search are irrelevant"); *cf., Graham v. Connor*, 490 U.S. 386, 397 (1989) ("As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objec-

tively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. [Citations omitted.] An officer's evil intention will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").

The Ninth Circuit, however, found that the Agents' subjective intent was not only relevant, but critical, to the determination of qualified immunity because it exclusively relied on the Gashos' contention that they were arrested because they "made [the Agents] mad." Inquiry into the Agents' subjective intent, however, is irrelevant to a proper determination of qualified immunity. This Court has consistently held that the proper standard is an objective test measuring the reasonableness of the Agents' conduct in relation to clearly established law. *See Anderson*, 483 U.S. at 641.

The Ninth Circuit's blatant error in applying established Supreme Court authority must be corrected. As this Court recognized in *Harlow:*

> 'It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial]. . . . The effect of this development upon the willingness of individuals to serve their country is obvious.'

Harlow, 457 U.S. at 817, n.29, *quoting Halperin v. Kissinger*, 196 U.S. App. DC 285, 307, 606 F.2d 1192, 1214 (1979), *aff'd.* in part, 452 U.S. 713 (1981).

Indeed, by reintroducing a subjective intent test into the qualified immunity defense, the Ninth Circuit made it virtu-

ally impossible for summary judgment to be granted on qualified immunity, exactly the outcome that the *Harlow* Court counseled against. Certiorari should be granted to correct the Ninth Circuit's clear misapplication of the well-established Supreme Court authority interpreting the qualified immunity standard in a *Bivens* action.

II. Certiorari Should be Granted to Correct the Ninth Circuit's Reliance on Only General and Irrelevant Principles of Constitutional Law to Defeat a Qualified Immunity Defense.

In *Anderson*, this Court held that in determining what constitutes clearly established law for purposes of qualified immunity, a court may not merely rely on generalized principles of constitutional law, but must specifically articulate the constitutional right in issue. *Anderson*, 483 U.S. at 640. In other words, the constitutional violation must be particularized to the facts and circumstances confronting the government official and must take into consideration the facts known at that time to the government official. *Id.* Indeed, the Court noted that to hold otherwise would be "to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."[15] *Id.* at 639; *see also Elder*, 114 S. Ct. 1019.[16]

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[15] In fact, the Gashos are now arguing below that the Ninth Circuit granted summary judgment against the Agents as a matter of law.

[16] In *Carlson v. Green*, 446 U.S. 14 (1980), Chief Justice (then Justice) Rehnquist recognized the need to particularize the factual scenario upon which clearly established law is based: "it is often not clear what conduct violates the Constitution. . . ." *Id.* at 46 (J. Rehnquist, dissenting). The Chief Justice went on to explain that "[e]ven where the legal principles are not in flux, the constitutional standard may be sufficiently general that it is difficult to predict in advance whether a particular set of facts amounts to a constitutional violation." *Id.* at 46, n.12.

Thus, in order to establish a violation of a clearly established constitutional law, reference only to generalized rights, such as the right to be free from arrest without probable cause, is insufficient. *See Anderson*, 483 U.S. at 639 (recognizing as an example that although the right to due process is well established, it is too over-broad a generalization upon which to deny a qualified immunity claim because it bears "no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*"). Instead, the determination must be based upon precedents relevant to the particular facts and circumstances. In deciding this case, the Ninth Circuit's inquiry into "clearly established law" relied upon the general principle that "[t]he Fourth Amendment right to be free from arrests without probable cause is clearly established." *Gasho*, 39 F.3d at 1438. Clearly, under *Anderson and Elder*, reliance on such a general principle of law is inadequate. It does not properly protect the Agents, but instead fashions a rule of "unlimited liability" which this Court has repeatedly counseled against, and which is contrary to this Court's express holdings on the qualified immunity standard.

Additionally, in assessing what is clearly established law, the court must rely only upon relevant and applicable law. *See Anderson*, 483 U.S. at 640. The Ninth Circuit, however, ignored this element, and relied on cases which are inapposite to the situation here. Specifically, the Ninth Circuit relied on the following legal principle: "[i]t is clearly established that a person's Fourth Amendment rights are violated if the sole basis for his arrest is his challenge to the officer's authority absent a warrant." *Gasho*, 39 F.3d at 1439; (*relying on Houston v. Hill*, 482 U.S. 451 (1987), *cert. denied*, 483 U.S. 1001 (1987), *Duran v. City of Douglas, Ariz.*, 904 F.2d 1372 (9th Cir. 1990), and *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978)). The court's reliance on the aforementioned cases is clearly misplaced.

In *Houston*, the Court held that a City of Houston Ordinance was unconstitutionally overbroad because it permitted arrests in violation of the First Amendment right of free

speech when individuals merely talked to police officers and challenged their authority. *See Houston*, 482 U.S. 451. The case had nothing to do with probable cause necessary to effect an arrest under the Fourth Amendment. Therefore, the case is irrelevant to the situation here.

In *Duran*,[17] the issue was whether an officer had probable cause to stop a vehicle based solely on the fact that the passenger made obscene gestures and statements to the police officer. *See Duran*, 904 F.2d 1372. The court held that probable cause was lacking because the actions were not illegal. *Id.* at 1377. The individual also alleged that he was stopped in retaliation for insulting the police officer. The court found that the police officers' conduct in that situation violated the First Amendment. *Id.* at 1378 . In this case, the Gashos have never alleged, argued or presented evidence of their arrest violating their First Amendment right of freedom of speech. Thus, this case, relied upon by the Ninth Circuit, is also irrelevant.

The Ninth Circuit also relied upon its decision in *Prescott*. In *Prescott*, after the defendant refused to allow law enforcement officers entry into her apartment, the officers forcibly entered the apartment without a warrant to effect an arrest of a third person not living in the defendant's residence. Prescott was subsequently arrested for being an accessory after the fact for refusing to permit the officers entry into her apartment. Prescott sought to have the evidence found in the apartment, including the third party, excluded as the fruits of an illegal search. *Id.* at 1347. The Ninth Circuit agreed that the warrantless entry was unconstitutional absent exigent circumstances and remanded the case to determine if exigent circumstances existed. *Id.* at 1350. The court then addressed the issue of whether the defendant's failure to allow a warrantless entry into the apartment could be used as evidence against her in the trial. The court concluded that, like the Fifth Amendment privilege against

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[17]Interestingly, *Duran* was decided after the Gashos' arrest in 1988. *See Elder*, 114 S.Ct. 1019.

self incrimination, evidence of "passive" refusal to consent to a warrantless search is privileged conduct which cannot be used as evidence of criminal wrongdoing. *Id.* at 1351.

The *Prescott* case is not at all applicable to the facts in this case. The arrest of the Gashos occurred in a public building, the Scottsdale Municipal Airport. The Court's ruling in *Prescott*, which centered on the defendant's refusal to allow entry of her home, has no bearing here.[18] Moreover, the fact that evidence of "passive" refusal to comply with a warrantless entry of a house cannot be introduced at trial, or is "privileged," has nothing to do with whether the Agents had a reasonable basis for probable cause to arrest the Gashos for failing to return the logbooks. This case sheds no light on whether the constitutional violation alleged by the plaintiffs involved clearly established law.

In short, assuming a reasonable law enforcement officer was fully aware of *Hill*, *Duran*, and *Prescott*, this knowledge would not in any way impact whether the officer should know that the Fourth Amendment prohibited arresting the Gashos at Scottsdale Municipal Airport because they failed to return the logbooks. Simply stated, the Ninth Circuit's evaluation of clearly established constitutional law was generalized and irrelevant, resulting in the very real potential for long term detrimental effects on law enforcement activities. The Ninth Circuit decision will chill law enforcement officials, both on the federal and state levels,[19] from performing their duties if they can be sued based upon violations of general principles of constitutional law or

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[18] Indeed, the *Prescott* court recognized that "the police need no warrant to arrest a felony suspect on probable cause in a public place." *Id.* at 1348, citing *United States v. Watson*, 423 U.S. 411 (1976).

[19] This Court has repeatedly recognized that qualified immunity under a *Bivens* action and a § 1983 action are identical because there is no legitimate reason to hold federal and state law enforcement officials to differing standards of conduct. *See e.g., Malley*, 475 U.S. at 340, n.2.

constitutional principles which have no predictable, specific application to the situation they are facing. Such a result is clearly contrary to this Court's well established authority.

The proper inquiry for the question of whether a "clearly established law" was violated considers what relevant constitutional law existed at the time relating to probable cause to arrest for taking property from a seized vehicle. No law was clearly established at the relevant time excepting from seizure the contents of a vehicle that had been seized. To the contrary, many decisions have indicated that seizure of a vehicle gives agents the right to search items in the vehicles either at the time of seizure or after the seizure. *See, e.g., Colorado v. Bertine*, 479 U.S. 367 (1987) (holding warrantless inventory search of backpack found in impounded vehicle does not violate Fourth Amendment); *Chambers v. Maroney*, 399 U.S. 42 (1970) (holding warrantless search of vehicle after it was impounded and moved to police station not violative of Fourth Amendment). These cases, although not directly on point, suggest that the seizure of a vehicle includes the seizure of its contents, because an officer can later search the contents without a warrant. Thus, the law was not clearly established that seizure of a vehicle does not include seizure of the contents. Consequently, the Ninth Circuit's opinion threatens to provide authority for rulings that seizure of any vehicle does not include seizure of the vehicle's contents.

The Ninth Circuit should have examined the objective reasonableness of the Agents' conduct in light of the relevant constitutional law. At the time of the arrests, 18 U.S.C. § 2232[20] proscribed removing property in order to prevent

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[20] The fact that the Ninth Circuit held no probable cause in fact existed under this statute is irrelevant. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In *Mitchell*, the Court held that the collateral order doctrine applied to the defense of qualified immunity and that denial of a motion for summary judgment based on the qualified

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seizure before, during and after seizure. 18 U.S.C. § 2232(a); *see also United States v. Woodring*, 536 F.2d 598 (5th Cir. 1976), *cert. denied*, 129 U.S. 1003 (1976). In *Woodring*, the defendant was convicted of violating 18 U.S.C. § 2232(a). Two customs agents arrived to seize a yacht and found it heading toward an inlet in the Atlantic Ocean. The agents gave chase and came to within 75 feet of the yacht. The officers motioned for the defendant to stop the yacht. The defendant did not stop and continued out to sea. The agents called for a helicopter which circled the yacht numerous times and attempted to communicate with those on board, using both sirens and a public address system. Soon thereafter, a coast guard cutter made radio contact with the yacht and told the defendants to stop. The defendant refused, escaped and was arrested three days later. The defendant argued that the evidence was insufficient to submit to the jury the question of his knowledge of a lawful attempt to seize the yacht. The Fifth Circuit held that the defendant's knowledge of a custom official's intent to seize the yacht was "clearly a reasonable inference from

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immunity defense was immediately appealable. *Id.*. The basis for the ruling was that

> [a] claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated. [Citation omitted.] An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions, or in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Id. at 527-528. In other words, whether probable cause to arrest was actually present is irrelevant; instead, the proper inquiry is what the clearly established law was at the time.

the factual showing on the record of the numerous attempts to halt the vessel and official demands for him to stop." *Id.* at 599. Moreover, the court held that the defendant's awareness of the attempt to seize the yacht and the proof of his intent required under § 2232 were questions for the jury. *Id.* at 600.

This case shows that the relevant federal law in issue relating to the particular facts surrounding the arrest of the Gashos was not clearly established. The facts known by the Agents establish that the Gashos were aware that the aircraft was seized. Indeed, the Gashos asked permission to enter the aircraft, thereby indicating to the agents their clear belief that the contents of the aircraft were seized as well.[21] The Agents gave specific instructions that the Gashos could remove personal property as well as a radio, but gave no permission to remove the aircraft's logbooks. After the Agents became aware that the logbooks were removed, they repeatedly asked for them back and told the Gashos they

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[21] Additionally, the Agents could have believed that the Gashos knew the logbooks were seized based on the facts that both Gashos were pilots, that the Gashos' business was to restore airplanes, that certain Federal Aviation Administration regulations often require logbooks to remain and be transferred with an aircraft (*see e.g.*, 14 C.F.R. § 121. 380(b)(3); 14 C.F.R. § 135.439(b)(3)), and that the Gashos asked permission to enter the plane. Based on these facts, a reasonable customs agent could have believed that the Gashos removed the logbooks in order to prevent seizure after they were seized. *See* 18 U.S.C. § 2232(a). Moreover, even assuming that the Gashos' initial knowledge of the seizure of the logbooks was not reasonably indicated, the agents specifically told the Gashos that the logbooks were seized and requested their return. When the Gashos refused, a reasonable agent could have believed that the Gashos intended to prevent seizure of the logbooks, an action clearly prohibited under 18 U.S.C. § 2232.

would be arrested if they did not comply.[22] Not only did the Gashos refuse, they were evasive about whether they in fact had the logbooks. Even if the Ninth Circuit properly interpreted the statute, it cannot be said that the law was so clearly established that only "the plainly incompetent or those who knowingly violate the law," *Malley*, 475 U.S. at 341, would have been aware that the arrests of the Gashos were unlawful.

Rather than address relevant constitutional standards, the Ninth Circuit relied upon general principles of constitutional law. The objective test of qualified immunity, as set forth in *Harlow*, however, is "intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' " *Anderson*, 483 U.S. at 646, *quoting Davis v. Scherer*, 468 U.S. 183, 195 (1984). Indeed, the qualified immunity standard is intended to give ample room for mistaken judgments by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. This Court again recently reiterated that "[e]ven law enforcement officials who 'reasonably but mistakenly conclude probable cause is present' are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). The Ninth Circuit's opinion will necessarily chill law enforcement officials by requiring them to assess their actions exclusively against very general and irrelevant principles before they act. They no longer have the higher degree of certainty provided by a test which looks to particularized precedent and the individualized facts before the officer.

As in *Hunter*, the Ninth Circuit has again erred in its application of the qualified immunity standard. As stated

[22] Contrary to *Harlow's* admonition to exercise caution and reflection, the Ninth Circuit is suggesting the better course of action would have been to have the Agents immediately arrest the Gashos. In this case, the Agents exercised restraint and gave the Gashos repeated opportunities to return the logbooks before they were arrested.

supra, the Ninth Circuit improperly injected a review of the agents' subjective intent into the qualified immunity standard and did not properly assess, articulate and apply the particularized constitutional law that was relevant to the factual circumstances present. These clear errors caused the Ninth Circuit to improperly analyze the objective reasonableness test of qualified immunity, stripping the mistaken, albeit reasonable, judgments of law enforcement officials from the scope of law enforcement judgments previously protected under federal law by the qualified immunity doctrine. Certiorari should be granted to correct the errors of the Ninth Circuit and restore the certainty and protection provided by the qualified immunity defense.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Dated: Phoenix, Arizona, April 26, 1995.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN R. GASHO, SR.; SHARON L. GASHO,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA; NORTHROP WORLDWIDE AIRCRAFT SERVICES, INC., an Oklahoma corporation, et al.,
Defendants-Appellees.

No. 92-16988
D.C. No. CV-89-02077-RCB

JOHN R. GASHO, SR.; SHARON L. GASHO; MILLARDAIR, LTD., a Canadian corporation,
Plaintiffs-Appellants,
v.
WILLIAM L. BALL; ROGER MANNHALTER; JOHN J. HOWE, JR.,
Defendants-Appellees.

No. 93-15727
D.C. No. CV-92-01211-RCB
OPINION

Appeals from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted
March 17, 1994—San Francisco, California

Filed November 2, 1994

Before: Dorothy W. Nelson, Robert Boochever and Robert R. Beezer, Circuit Judges

Opinion by Judge Beezer

COUNSEL

Merwin D. Grant, Christine R. Taradash, and Maria Crimi Speth, Beus, Gilbert & Morrill, Phoenix, Arizona, for the plaintiffs-appellants.

Barbara L. Herwig and Wendy M. Keats, United States Department of Justice, Washington, D.C., for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

These cases involve the seizure of an aircraft and the arrest of its owners, John and Sharon Gasho, by the United States Customs Service. The Gashos filed false arrest and other tort claims against the United States, pursuant to the Federal Tort Claims Act (FTCA), 18 U.S.C. §§ 1346(b), 2674. The district court dismissed the Gashos' action. The Gashos then filed a *Bivens* action against the Customs agents, claiming that the aircraft seizure and personal arrests violated their Fourth and Fifth Amendment rights. The district court dismissed the *Bivens* action pursuant to 28 U.S.C. § 2676. We have jurisdiction over both of the Gashos' appeals pursuant to 28 U.S.C. § 1291. We reverse in part, affirm in part and remand for further proceedings.

I

John and Sharon Gasho own an aircraft restoration company in Tucson, Arizona. On June 24, 1988, the Gashos flew a McDonnell Douglas DC-3 aircraft to Scottsdale Municipal Airport in order to meet with John Zarcone, a Federal Aviation Administration (FAA) inspector. The Gashos were selling the aircraft to Millardair, Ltd., a Canadian corporation, and they wanted to terminate the United States registration of the aircraft before export.

At the airport, Zarcone issued the Gashos several documents, including a special flight authorization allowing the aircraft to be flown to the United States-Canada border with Canadian registry markings. The authorization stated that Canada would not issue a valid Canadian registration until the aircraft actually entered into Canada.[1] The Gashos and Zarcone removed the U.S. registration markings and affixed the Canadian markings to the aircraft. The Gashos then returned to their hotel room.

An air traffic controller at the airport noticed that the registration markings on the DC-3 had been changed after its arrival. He alerted William Gately, the Customs agent in charge. Gately dispatched Special Agents William Ball and Roger Mannhalter to investigate.[2] The agents confronted the Gashos at their hotel room. John Gasho explained that he obtained the Canadian registry markings from the aircraft's new owner, Millardair, and that an FAA inspector had assisted in changing the registration markings. He explained that the FAA inspector issued a special authorization permit, which was inside the aircraft, allowing the

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[1] Millardair, a co-appellant, had applied to Canadian authorities for a Canadian registration and had been assigned a Canadian number; however, official registration was to be contingent upon the aircraft's entry into Canada.

[2] In a deposition, Gately testified that he also telephoned Corporal Karol Waversfeld of the Royal Canadian Mounted Police. He said Waversfeld told him the registration markings were invalid. Waversfeld gave a different account in a deposition. He testified that Lorraine Gray of the Canadian Transport Ministry told him that an application for Canadian registry was pending and that the numbers could not be used until the application was approved. Waversfeld testified that he relayed this same information to Gately or his representative. There is also a dispute regarding when the information was relayed to Gately. The United States contends Gately knew about the information before the seizure of the aircraft. The Gashos, however, point to testimony by Waversfeld and Gray indicating that Gately did not receive the information until after the seizure.

aircraft to be flown to Canada. Agent Ball began advising John Gasho of his *Miranda* rights. The Gashos then summoned their daughter, Pamela Vining, a Phoenix attorney, for legal counsel.

The agents, the Gashos and Vining went to the Scottsdale airfield. There, the Gashos showed the agents the special flight authorization allowing them to fly the aircraft with Canadian markings. While the document allowed the aircraft to fly with the Canadian markings, the agents decided that the document did not establish the *validity* of the Canadian markings. Zarcone could not be reached by telephone. The agents placed a lock on the aircraft's propeller, believing they had probable cause to seize the aircraft for the "knowing[ ] and willful[ ]" display of "false or misleading" markings, in violation of 49 U.S.C. § 1472.[3]

After seizing the aircraft, the Customs agents gave permission to Sharon Gasho to enter the aircraft to remove personal belongings and the aircraft's radio. The Customs agents did not tell her that any items inside the aircraft were seized. Among the items she removed were the aircraft's logbooks. Sharon Gasho then exited the aircraft, carrying the items in a plastic bag. At that time, John Gasho and the Customs agents were standing on the tarmac near the aircraft. In the presence of the Customs agents, John Gasho called out to his wife and asked her whether she removed the logbooks. She replied, "Yes, I did." Sharon Gasho then placed the plastic grocery bag containing the logbooks and other personal belongings into Vining's automobile. It is undisputed that the agents did not protest or attempt to stop Sharon Gasho from removing the logbooks and placing

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[3] The section prohibits persons from "knowingly and willfully" displaying registration markings on an aircraft that are "false or misleading" as to the nationality or registration of the aircraft. 49 U.S.C. § 1472(b)(1)(H).

them in the vehicle.[4] In a deposition, Agent Ball was cross-examined as follows:

Q. Did you stop her at that time?

A. No.

Q. Did you say anything to her at that time?

A. No.

Q. Did you protest in any way?

A. No.

Q. All right. What happened next?

A. Shortly thereafter we went inside the aviation center.

The subject of the logbooks was not raised until after the parties entered the Scottsdale Aviation Center to make photocopies of the FAA documents. Ball and the other agents then told the Gashos that the seizure of the aircraft included the logbooks and demanded that the Gashos return them. The Gashos refused. They told the agents that a warrant was required. The agents repeatedly warned the Gashos that they would be arrested if they refused to turn over the logbooks. The Gashos called the local police, but they refused to intervene. At Vining's request, the agents allowed Vining to meet with the Gashos in a private, glass-enclosed office. After several minutes, the agents sought entry to the office. Although there is a dispute over whether the Gashos refused to open the door, the agents entered with a key and arrested the Gashos. While the agents were handcuffing her parents, Vining retrieved the logbooks from her car and gave them to the Customs agents.

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[4] Although the district court's opinion stated that the parties "disagree" on this point, in the same opinion the court later noted that the agents did not immediately react upon learning that the logbooks had been removed from the aircraft. *See* Order Granting Motion for Summary Judgment, ¶ 17.

The Gashos were booked for violation of 18 U.S.C. § 549, which forbids unlawful removal of property from Customs custody. During booking, an Assistant United States Attorney told Agent Mannhalter that his office would not prosecute the Gashos. Nevertheless, Agent Mannhalter's supervisor, John Howe, ordered Mannhalter to continue the booking and to tell the Gashos that charges would be filed. In October 1989, sixteen months after the arrests, the United States Attorney formally declined to prosecute the Gashos.

A few weeks after the seizure and the arrests, Millardair completed the Canadian registration for the aircraft. The United States Attorney declined to initiate forfeiture proceedings against the DC-3 and advised Customs to release the aircraft. The regional counsel for Customs agreed with the United States Attorney that the aircraft should be released but said the release should be conditioned upon the receipt of an agreement from the Gashos releasing Customs and its agents from all civil liability. Six months after it was seized, the aircraft finally was released to Millardair. No release of liability was executed by the appellants.

The Gashos filed suit against the United States under the FTCA, seeking damages for false arrest and false imprisonment, intentional infliction of emotional distress, and abuse of process.[5] The district court granted summary judgment to the government on the false arrest and imprisonment claims and the intentional infliction of emotional distress claim. By subsequent order, the district court dismissed the abuse of process claim for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Following the dismissal of the FTCA claims, the Gashos filed a *Bivens* action against Agents Ball and Mannhalter, and Howe, the agents' supervisor. The Gashos claimed that

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[5] The Gashos also filed a claim against Northrop Worldwide Aircraft Services, Inc. for damage incurred to the aircraft while it was in Customs custody.

the agents arrested them without probable cause, violating their Fourth and Fifth Amendment rights. In addition, in a claim joined by Millardair, the Gashos contended that the agents seized the aircraft without probable cause or due process.

In support of their *Bivens* claims, the plaintiffs produced a deposition from a Customs Agent who testified that he deliberately avoided assisting in the arrest because he had a "bad feeling about the situation" and did not want to be involved. In addition, Customs Pilot David Kunz testified that Howe told him that the Gashos were arrested, in part, because the Gashos' defiance in refusing to turn over the logbooks "made us mad." Kunz, who took contemporaneous notes of the conversation, testified that Howe also told him that Customs was pursuing criminal proceedings against the Gashos in order to "protect ourselves in case of a lawsuit later."

The defendants moved to dismiss the *Bivens* claim pursuant to Fed.R.Civ.P. 12(b)(6) and also moved for summary judgment, arguing that 28 U.S.C. § 2676 operates as a complete bar to the *Bivens* action and, alternatively, that the defendants were entitled to qualified immunity. The district court dismissed the claim, concluding that it was barred by 28 U.S.C. § 2676.

II

We first address whether the district court erred in granting summary judgment to the United States on the FTCA claims alleging false arrest and imprisonment. Summary judgment is reviewed *de novo*. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 1992). Viewing the evidence in the light most favorable to the nonmoving party, we determine whether there are genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385, 387 (9th Cir. 1990), *aff'd.*, 502 U.S. 81 (1991).

Under the FTCA, the United States is liable for common law torts committed by federal employees within the scope of their federal employment. *See* 28 U.S.C. §§ 1346(b), 2674. The FTCA allows liability for false arrest or false imprisonment when such torts are committed by federal law enforcement officers. 28 U.S.C. § 2680(h). Liability is determined by the tort law of the state where the claim arose. *Id.*

[1] Under Arizona law, probable cause is an absolute defense to a claim of false arrest and imprisonment. *Hockett v. City of Tucson*, 678 P.2d 502, 505 (Ariz. Ct. App. 1983). The defendant bears the burdens of production and persuasion for any defense. *See In re Estate of Page*, 865 P.2d 128, 135 (Ariz. Ct. App. 1993). Accordingly, as the party moving for summary judgment, the United States must show that there is no genuine issue as to probable cause and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The material facts and circumstances of the arrests are undisputed: Sharon Gasho removed logbooks from the seized aircraft after being given permission to enter the aircraft and remove personal belongings and the radio; Customs agents did not attempt to prevent her from removing the logbooks; the Customs agents did not demand the logbooks until after they had been placed in Vining's car, and the Gashos later refused to comply with the agents' request to turn over the logbooks because they believed the officers needed a warrant. In civil cases, the existence of probable cause is a question for the jury. *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984). However, when there is no genuine issue of fact, summary judgment is appropriate if no reasonable jury could find an absence of probable cause under the facts. *Id.* In making the probable cause determination, we construe the evidence in the light most favorable to the party opposing summary judgment — in this case, the Gashos. *See id.*

Probable cause is more than mere suspicion. Probable cause exists when, "under the totality of circumstances

known to the arresting officers, a prudent person would have concluded that there was a fair probability" that a crime was committed. *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986). Because probable cause must be evaluated from the perspective of "prudent men, not legal technicians," *Brinegar v. United States*, 338 U.S. 160, 176 (1949), an officer need not have probable cause for every element of the offense. *United States v. Thornton*, 710 F.2d 513, 515 (9th Cir. 1983). However, when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred. *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 705 (9th Cir. 1989).

[2] The Gashos were arrested pursuant to 18 U.S.C. § 549, which forbids the "unlawful remov[al]" of property under the control or custody of Customs. The United States conceded that no probable cause for the Gashos' arrests existed under 18 U.S.C. § 549. The statute requires "felonious intent," *see United States v. Slocum*, 708 F.2d 587, 596 (11th Cir. 1983), and the district court noted that there was no evidence that the Gashos had such intent. The district court held instead that the arrests were justified under either of two other statutes:[6] 18 U.S.C. § 2233, which

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[6] We agree with the district court that a lack of probable cause under 18 U.S.C. § 549 does not preclude the United States from asserting the defense. Probable cause may still exist for a closely related offense, even if that offense was not invoked by the arresting officer, as long as it involves the same conduct for which the suspect was arrested. *See United States v. Rambo*, 789 F.2d 1289, 1294 (8th Cir. 1986). It is immaterial that the officer did not have in mind the specific charge upon which the arrest can be justified. *Id.*

The Gashos urge us to follow *Santiago v. Fenton*, 891 F.2d 373, 385-86 (1st Cir. 1989). *Santiago* held that if a suspect is arrested for the wrong reason, the arrest cannot be justified later by the fact that the officer might have had another good reason. *Id.* at

[cont'd]

prohibits forcible rescue of seized property, or 18 U.S.C. § 2232, which prohibits removal of property to prevent seizure.[7]

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385. *Santiago* is easily distinguished on its facts. The officer in *Santiago* attempted to justify the arrest by pointing to *different* conduct by the arrestee. Here, as in *Rambo*, the United States is citing a closely related offense for the same conduct by the arrestee.

[7] Only the facts and circumstances relating to the arrests are relevant to the inquiry into whether probable cause existed under either § 2233 or § 2232. The alleged unlawfulness of the seizure of the aircraft is immaterial to whether there was probable cause to arrest the Gashos, because there is no evidence of "bad faith, unreasonable force, or provocative conduct" in connection with the seizure. *See United States v. Garcia*, 516 F.2d 318, 320 (9th Cir.) ("We will not apply any self-help right to immunize suspicious conduct from consideration in determining whether there is probable cause to arrest or to search."), *cert. denied*, 423 U.S. 934 (1975); *see also United States v. Span*, 970 F.2d 573, 580 (9th Cir. 1992) (stating that the right to interfere physically with "unlawful" police action is "not triggered by absence of probable cause, but rather by the officer's bad faith or provocative conduct" — where it appears that the "officer is engaged in a 'frolic of his own'") (quoting *United States v. Martinez*, 465 F.2d 79, 82 (2d Cir. 1972)), *cert. denied*, 113 S.Ct. 1283 (1993).

If, for example, the officers *knew* their seizure of the aircraft was without probable cause, the officers would have acted in bad faith and any physical interference to that seizure would be immune. Normally, the existence of bad faith would be a jury question. However, there is no genuine issue here because the evidence put forth by the appellants is insufficient to lead a reasonable jury to conclude that the officers seized the aircraft in "bad faith." The Gashos speculate that Supervisor John Howe, who had been newly promoted as supervisor, ordered the seizure to "score points after his promotion." This could not support a jury finding that Howe was engaged in a "frolic of his own."

A.

[3] The Gashos argue that the Customs agents did not have probable cause to arrest the Gashos for violating § 2233, the "forcible rescue" statute. Section 2233 applies to any person who

> forcibly rescues, dispossesses, or attempts to rescue or dispossess any property, articles, or objects *after* the same shall have been taken, detained or seized by any officer or other person under the authority of any revenue law of the United States, or by any person authorized to make searches and seizures . . . .

18 U.S.C. § 2233 (emphasis added). As its plain language indicates, the "forcible rescue" statute is exclusively concerned with the rescue of property *after* it has been seized by an officer of the United States. *United States v. Spicer*, 547 F.2d 1228, 1233 (5th Cir.), *cert. denied*, 430 U.S. 987 (1977). The offense of "forcible rescue" has three elements: (1) seizure of the property by the United States, (2) knowledge by the defendant that the property has been seized and that removal is unlawful, and (3) forcible and willful removal of the property from the dominion and control of the government. *See United States v. Sanders*, 862 F.2d 79, 83 (4th Cir. 1988); *cf. United States v. Hardaway*, 731 F.2d 1138, 1140 (5th Cir.) (interpreting forcible rescue under analogous provision in Internal Revenue Code, 26 U.S.C. § 7212(b)), *cert. denied*, 469 U.S. 865 (1984).

The last two elements require specific intent: the defendant must not merely intend to remove the property but also intend to frustrate a lawful seizure. *See Spicer*, 547 F.2d at 1232 (forcible rescue occurs when property is taken "with the purpose to use it in a manner that defie[s] and frustrate[s] the warrant of seizure.") When specific intent is an element of the alleged offense, "[p]art of the probable cause analysis must be whether the officers could believe that [the person arrested] had the necessary intent." *Kennedy*, 901 F.2d at 705. The agents must have reasonably

believed that Sharon Gasho intended to steal the logbooks from Customs.[8]

It is fundamental that a person is not criminally responsible unless criminal intent accompanies the wrongful act. *Morissette v. United States*, 342 U.S. 246, 251 (1952) (stating that a crime is the "concurrence of an evil-meaning mind with an evil-doing hand"). Consequently, to have probable cause to believe that a crime has been committed, an arresting officer would have to reasonably believe that Sharon Gasho intended to defy and frustrate the seizure at the time that she removed the logbooks.

[4] Specific intent to frustrate seizure minimally requires that an actor know that the goods are seized. The actor cannot know that goods are seized unless the government gives notice of their seizure. *See Sanders*, 862 F.2d at 83 (seizure exists when the government has "lawfully asserted dominion and lawfully maintained custody" over the property).[9] In this case, an officer could not reasonably believe that Sharon Gasho had specific intent when she took the

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[8] The Supreme Court has insisted that probable cause analysis cannot rest on "rigid legal rules" but rather must rest on a "commonsense" approach that is "practical" and "nontechnical." *Illinois v. Gates*, 462 U.S. 213, 230 (1983). We are mindful of this approach. In requiring probable cause for specific intent when specific intent is an element of the crime, we are not subjecting our probable cause analysis to "rigid legal rules." We believe it is a matter of common sense that before arresting a person for taking property in the custody of Customs, an officer should reasonably believe that the person intends to steal.

[9] *Cf. United States v. Harris*, 521 F.2d 1089, 1093 (7th Cir. 1975) (warning stickers on seized automobile were "formal indication that the car had been seized"); *United States v. Main*, 598 F.2d 1086 (7th Cir.) (verbal notice that vehicle was seized and tearing of seizure stickers from rental property), *cert. denied*, 444 U.S. 943 (1979); *United States v. Scolnick*, 392 F.2d 320 (3d Cir.) (breaking of bank window, removal of seizure seal on box, and removal of safe deposit box and contents from bank), *cert. denied*, 392 U.S. 931 (1968).

logbooks. While Customs gave notice of the *aircraft's* seizure by placing a lock on a propeller, Customs asserted no dominion and maintained no custody over the logbooks before Sharon Gasho boarded the aircraft. *See id.* On the contrary, Customs allowed Sharon Gasho to enter the aircraft specifically for the purpose of removing objects from inside. While Customs allowed her inside the aircraft only to retrieve "personal belongings" and the aircraft's radio, these instructions were insufficient notice that the logbooks were seized, as the logbooks are personal property. Absent notice of seizure, it was unreasonable to believe that Sharon Gasho knew the logbooks were seized or that their removal was forbidden when she took them. There was no probable cause to arrest Sharon Gasho under § 2233. It follows that the Customs agents had no probable cause to arrest John Gasho, as he did not participate in removing the logbooks.

The United States argues that the Gashos were "continually and indisputably aware" that removal of the logbooks was forbidden, because logbooks are an "appurtenance" to an aircraft. We disagree. It is unreasonable to infer specific intent merely on the notion that the Gashos should have known that the logbooks were part of the aircraft.[10] *See Phillips v. United States*, 356 F.2d 297, 303 (9th Cir. 1965) (only actual knowledge, not constructive knowledge, of invidious act allows an inference of specific intent), *cert. denied*, 384 U.S. 952 (1966). Knowledge that the logbooks were seized as an appurtenance to the aircraft cannot be imputed as a matter of common sense. If the logbooks were seized as an appurtenance, it was incumbent upon the agents to inform Sharon Gasho of that fact before she entered the aircraft, either by physically securing the log-

[10] The government points to deposition testimony by John Gasho that he was aware that logbooks are typically transferred with the aircraft's title upon sale. This testimony is not probative, or two reasons. First, it does not establish that John Gasho knew that the logbooks transferred with the aircraft upon *seizure*. Second, it is irrelevant to determining the facts and circumstances known by the agents at the time of arrest.

books or by verbally informing her. They neglected to do so. Indeed, they said and did nothing even when she took the logbooks with their knowledge and announced to her husband in the agents' presence that she had removed the logbooks from the aircraft.

In short, probable cause for forcible rescue is lacking unless there is a "fair probability" that the person knew that removal of the goods was forbidden and took the goods with the intent to steal them. The facts and circumstances here did not give the agents probable cause to believe the Gashos had such knowledge or intent when Sharon Gasho took the logbooks.

B.

[5] The government alternatively argues that probable cause existed to arrest the Gashos under § 2232, which prohibits persons from physically interfering with searches and seizures. Section 2232 provides:

> (a) Physical interference with search. — Whoever, before, during, or after seizure of any property by any person authorized to make searches and seizures, *in order to prevent the seizure or securing of any goods*, wares, or merchandise by such person, staves, breaks, throws overboard, destroys, or removes the same, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2232(a) (emphasis added).

In contrast to § 2233, § 2232 is concerned primarily with the destruction or removal of property *before* it is seized. *See Spicer*, 547 F.2d at 1233. An actor is liable only if he removes or destroys the property with the purpose of preventing seizure. *See, e.g., United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987) (defendant threw marijuana overboard and set ship on fire). An essential element of § 2232 is that the defendant have the "specific intent" to prevent the seizure of the goods. *United States v. Gibbons*,

331 F.Supp. 970, 972 (D. Del. 1971), *aff'd.*, 463 F.2d 1201 (3d Cir. 1972).

The specific intent inquiry for § 2232 closely mirrors the inquiry under § 2233. For an officer to reasonably believe that the actor intended to prevent seizure in violation of § 2232, the facts and circumstances available to the officer must suggest that the actor had some notice that the goods were subject to imminent seizure. Such notice exists when the officer serves a search warrant or engages the defendant in "hot pursuit." *See id.*

[6] Customs gave Sharon Gasho permission to enter the aircraft and remove personal belongings. It is undisputed that Sharon Gasho removed the logbooks from the seized aircraft, put the logbooks and other personal belongings in a plastic bag, and then placed the bag in her daughter's car. But the fact that she "removed" the logbooks does not establish probable cause under § 2232, for the same reason that no probable cause existed under § 2233: because the government gave no notice that they intended to seize the logbooks, the Customs agents had no reasonable basis to believe that Sharon Gasho knew that the removal of the logbooks was forbidden or that she intended to prevent their seizure at the time that she took them from the aircraft.

Eventually, the agents did give notice to the Gashos that they intended to seize the property. But the demand for the logbooks came only *after* Sharon Gasho placed the plastic bag containing the logbooks in Vining's car. As Agent Ball testified in his deposition, the agents did not demand the logbooks when they knew she was carrying them out of the aircraft. Only later, after the Gashos and the Customs agents entered the aviation center to photocopy the FAA documents, did Ball and the other agents finally tell the Gashos that the seizure of the aircraft included the logbooks and demand their return. The Gashos and Vining then refused to turn over the logbooks, believing the agents were required to obtain a warrant. Their refusal was passive; they did not attempt to drive Vining's vehicle away

from the airport or otherwise physically interfere with the government's search or seizure. The Gashos only refused to consent to the warrantless seizure.

[7] Although the refusal to turn over the logbooks clearly is not an act that falls within the prohibitions of either § 2233 or § 2232,[11] the government nevertheless argues that the Gashos' refusal provided probable cause for arrest under § 2232. The point of the government's argument is that the Gashos' refusal to hand over the logbooks gave rise to a reasonable inference that they had the specific intent to prevent seizure at the time Sharon Gasho removed

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[11] The Gashos' refusal later to hand over the logbooks is not "forcible rescue" under § 2233, as the logbooks were not in the government's possession during the refusal. *See Sanders*, 862 F.2d at 83 (rescue is forcible when the rescue disrupts the government's possession). Absent some physical act of force, the mere refusal to cooperate is not "forcible." *See United States v. Cunningham*, 509 F.2d 961, 963 (D.C. Cir. 1975) (per curiam) (to be forcible, an act must be accompanied by "some measure of presently applied force") (interpreting 18 U.S.C. § 111, which prohibits forcible interference with federal officers).

Nor is the mere refusal to turn over the logbooks a prohibited act under § 2232. The statute mentions only acts which destroy or remove property. Thus, a person is liable only if he destroys or removes property. Our construction of the statute is consistent with the cardinal rule that penal statutes must be strictly construed. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Under our construction, the Gashos' passive refusal is not a prohibited act, as it did not physically interfere with the seizure by destroying or removing the property. If the agents believed that they had probable cause to seize the logbooks as an appurtenance to the aircraft and that exigent circumstances excused the lack of a warrant, they simply could have seized the logbooks from Vining's automobile. The Gashos' passive resistance to the search and seizure posed no physical interference to the agents' law enforcement objectives. If the seizure was justified, the Gashos' consent to effect the seizure was hardly required.

the logbooks from the aircraft. We disagree. A passive refusal to hand over property cannot be grounds for inferring criminal intent. The Fourth Amendment gives citizens the right to refuse to consent to warrantless searches and seizures. *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978). Consequently, the "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." *Id.* If a passive refusal to hand over property can give rise to an inference of specific intent under § 2232, the right of citizens to withhold consent to warrantless searches or seizures would be threatened. An officer could use the threat of arrest as coercion to obtain consent to a warrantless search or seizure. "[A]n unfair and impermissible burden would be placed upon the assertion of a constitutional right and future consents would not be 'freely and voluntarily given.'" *Id.* (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).[12] While we recognize that citizens have a lower expectation of privacy when searches involve plastic bags in automobiles rather than houses, *see United States v. Mackey*, 626 F.2d 684, 686-87 (9th Cir. 1980), the citizen nevertheless retains the right to refuse consent to a warrantless search of the bag containing his personal effects, even if

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[12] We recognize that a citizen has no right to resist a search or seizure pursuant to a warrant. *Bumper*, 391 U.S. at 550. Warrantless searches are another matter. In warrantless searches, there is a presumption the officer has no right to enter and search the property, though the lack of a warrant later may be excused under one of various exceptions if the officer has probable cause. *See Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). The passive refusal to cooperate in such searches is not criminal, as citizens cannot fairly be expected to surrender their rights simply on the word of officers, nor can they fairly be expected to ascertain on their own whether the absence of a warrant is excused. *Prescott*, 581 F.2d at 1350-51. This right is limited to *passive* refusals to consent or cooperate. We are not confronted with the situation where a citizen resorts to physical resistance that interferes with a search or seizure. *See United States v. Flores*, 887 F.2d 543, 545 (5th Cir. 1989).

consent is given to search the vehicle. *Cf. Florida v. Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents.").

Even if we were to permit officers to infer specific intent from a person's refusal to consent to a search, such an inference would be unreasonable in this case, under the totality of the circumstances: Customs agents provided no notice that the logbooks were seized, they allowed Sharon Gasho to board the aircraft for the specific purpose of removing items, she made no attempt to conceal her removal of the logbooks, and the agents knew she removed the books but did not immediately object. Indeed, some time passed before the agents asked for the logbooks. The passage of time between the removal of the logbooks and the Gashos' refusal to turn them over attenuates any inference of specific intent. Under these facts, Sharon Gasho's act of removing the logbooks from the aircraft does not necessarily evince any criminal purpose. She simply could have been removing her personal property, which Customs gave her permission to do. "Probable cause is lacking if the circumstances relied on are 'susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities.'" *United States v. Moore*, 483 F.2d 1361, 1363 (9th Cir. 1973) (quoting *United States v. Selby*, 407 F.2d 241, 243 (9th Cir. 1969)).

[8] In summary, the Customs agents had no probable cause under either § 2233 or § 2232 to arrest the Gashos, because the agents had no reasonable basis to believe that Sharon Gasho knew that removal of the logbooks was forbidden or that she intended to frustrate or prevent their seizure when she carried them from the aircraft. The passive refusal to hand over property pursuant to a warrantless search or seizure is privileged conduct which cannot be the basis for inferring criminal intent. We reverse summary judgment on the FTCA claims of false arrest and imprisonment.

III

The appellants contend that the district court erred when it granted summary judgment to the government on their claim of intentional infliction of emotional distress. We review summary judgment *de novo*. *Jones*, 968 F.2d at 940.

Under Arizona law, a plaintiff alleging the intentional infliction of emotional distress must plead and prove that: (1) the defendant's actions were extreme and outrageous, (2) the defendants either intended to cause emotional distress or acted in reckless disregard of that result, and (3) severe emotional distress in fact occurred. *Ford v. Revlon, Inc.*, 734 P.2d 580 (Ariz. 1987) (en banc).

The Gashos based their emotional distress claim on three acts by the United States: the seizure of the aircraft, the arrests, and the threat of continuing prosecution. Each act must be discussed separately, as the FTCA exempts certain government activities from the FTCA's waiver of sovereign immunity.

A.

[9] We first address whether the seizure of the aircraft is conduct exempt from FTCA liability. The Gashos claim that the Customs agents seized the aircraft with either the intent to inflict severe emotional distress, or with the careless disregard for that result. The United States contends that the emotional distress claim based on the seizure is barred by the "plain terms" of the Customs detention exception in 28 U.S.C. § 2680(c). A jurisdictional bar, § 2680(c) exempts the United States from liability for "any claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs." 28 U.S.C. § 2680(c).

[10] The Gashos assert that § 2680(c) does not preclude them from relying on the seizure as a basis for their emotional distress tort claim. After § 2680(c) was enacted, Congress added an amendment to § 2680(h), permitting

recovery for various intentional torts when committed by an "investigative or law enforcement officer," including the intentional infliction of emotional distress. 28 U.S.C. § 2680(h); *Sheehan v. United States*, 896 F.2d 1168, 1169, *amended on other grounds*, 917 F.2d 424 (9th Cir. 1990). The Gashos contend that the intentional torts remedy in § 2680(h) amended the Customs exception in § 2680(c), exempting only negligent torts by Customs officials.

We addressed a similar question in *Wright v. United States*, 719 F.2d 1032, 1035-36 (9th Cir. 1983). *Wright* involved an alleged intentional tort by an Internal Revenue Service agent arising out of his testimony before a grand jury. Besides exempting claims that arise with respect to Customs seizures, § 2680(c) also exempts claims that arise with respect to "the assessment or collection of any tax" by IRS agents. We stated that §§ 2680(c) and 2680(h) must be interpreted in a manner that reconciles them, without doing violence to either. *Id.* at 1036. Under the facts in *Wright*, we held that the IRS agent was not immune from liability, insofar as his alleged tortious conduct did not constitute an "assessment" or "collection" of a tax, within the strict meaning of those words. *See id.* at 1035-36.

We read *Wright* as requiring the United States to first demonstrate that the Customs or IRS agent's tortious conduct falls within the scope of activities exempted in § 2680(c). If such a showing is made, the claim is barred. If the government fails to show that the tortious conduct is exempt, the plaintiff's claim is not barred, assuming the plaintiff demonstrates that an "investigative or law enforcement officer" committed the intentional tort.

[11] In the Gashos' case, the government clearly met its burden. The actions of the Customs agents, the seizure and detention of the aircraft, are precisely the kinds of acts that Congress exempted from liability in § 2680(c). The Gashos cannot base their emotional distress claim on the seizure, even if it was without probable cause.

Other courts interpreting the interplay of § 2680(h) and the FTCA exceptions have applied a similar analysis. In *Gray v. Bell*, 712 F.2d 490, 507-08 (D.C. Cir 1983), *cert. denied*, 465 U.S. 1100 (1984) the court addressed whether a plaintiff could pursue an intentional tort claim against a law enforcement officer, pursuant to § 2680(h), when the tortious conduct fell within the "discretionary function" exemption of § 2680(a). The court held that to maintain an FTCA claim for an intentional tort under § 2680(h), a plaintiff must first clear the "discretionary function" hurdle. *Id.; see also Pooler v. United States*, 787 F.2d 868, 872-73 (3d Cir.), *cert. denied*, 479 U.S. 849 (1986). *Contra Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987).

[12] We recognize that our holding effectively bars any remedy for intentional torts with respect to seizures by Customs. But statutes waiving the sovereign immunity of the United States must be "construed strictly in favor of the sovereign." *McMahon v. United States*, 342 U.S. 25, 27 (1951). When strictly construed in light of § 2680(c), the waiver of immunity in § 2680(h) applies only to tortious conduct not involving the seizure and detention of goods by Customs. Our holding furthers Congress' intent in creating the Customs exemption: ensuring that Customs activities, as a class, should not be disrupted by threat of suit. *See Kosak v. United States*, 465 U.S. 848, 858 (1984). Thus, the Gashos' emotional distress claim is barred, insofar as it relies on injuries stemming from Customs' seizure of the aircraft.

B.

We next address whether the arrests of the Gashos can form the basis for an emotional distress claim under the FTCA.

[13] As the government concedes, the Customs exception in § 2680(c) does not bar an intentional tort claim arising out of arrests by Customs agents, as the exception applies only to the detention of goods and merchandise, not persons. The district court granted summary judgment to

the government on the ground that an emotional distress claim must fail when the mental anguish arises entirely from another tort — in this case, false arrest. *See* Restatement (Second) of Torts, § 47, cmt. a.

[14] The district court's holding was in error. The Restatement only says that *consequential* mental anguish from a separate tort does not establish a claim for intentional infliction of emotional distress. If the Gashos can prove that the arresting officers arrested them with the *intent* of inflicting emotional distress, the Gashos may assert both false arrest *and* emotional distress claims. *See id.* at § 46; *Garus v. Rose Acre Farms, Inc.*, 839 F.Supp. 563, 569 (N.D.Ind. 1933) (finding that the Restatement rejected old rule that mental anguish was merely "parasitic" to the host cause of action and not a separate tort). In short, if the arrests were motivated by malice, the Gashos are entitled to assert a separate tort claim based on the emotional distress resulting from the arrests.

[15] To prove malicious intent, the Gashos relied on testimony from a Customs pilot, David Kunz. According to Kunz, John Howe, the Customs supervisor, admitted that he arrested the Gashos because they "made us mad." The Gashos also introduced deposition testimony from a Customs agent who testified that he deliberately avoided participating in the arrest because he had a "bad feeling about the situation" and did not want to be involved. The Gashos also allege that they were "paraded" through the airport lobby in handcuffs. These facts and circumstances, combined with the lack of probable cause for the arrest, are sufficient to create a genuine issue of material fact on the issue of malice.

C.

We next consider whether the pursuit of criminal proceedings may support an emotional distress claim under the FTCA.

[16] The Gashos contend that the Customs agents intentionally inflicted emotional distress by telling them that

charges would be pursued against them.[13] The Gashos contend they "lived with the fear of a criminal prosecution for a full 16 months when Customs knew that the Government never intended to pursue the matter." Only later, after the civil suit was filed, did the Gashos learn that an Assistant United States Attorney had declined to prosecute them on the day they were arrested. To prove malicious intent, the Gashos produced a deposition from Kunz, the Customs pilot. Kunz testified that John Howe, the Customs supervisor, had told him that Customs was pursuing prosecution against the Gashos in order to "protect ourselves in case of a lawsuit later."

[17] The government argues that the agents' conduct in preparing the case for prosecution is immune from liability under § 2680(a), the "discretionary function" exception. The exception exempts the United States from liability under the FTCA for any claim

> based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). If a defendant can show that the tortious conduct involves a "discretionary function," a plaintiff cannot maintain an FTCA claim, even if the discretionary act constitutes an intentional tort under § 2680(h). *See Wright*, 719 F.2d at 1035; *Gray*, 712 F.2d at 507-08.

To determine whether a defendant's conduct is of a discretionary nature, we must look to the nature of the alleged wrongful conduct. *Weissich v. United States*, 4 F.3d 810, 812 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705

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[13] The Gashos cannot pursue a claim for malicious prosecution because an essential element is the actual commencement of a criminal prosecution, which did not occur in this case. *See Slade v. City of Phoenix*, 541 P.2d 550, 552 (Ariz. 1975). Instead, the Gashos allege intentional infliction of emotional distress.

(1994). Even if the conduct is discretionary, the conduct is protected by § 2680(a) only if it implements social, economic or political policy. *Id.* If the agents had "room . . . to make independent policy judgments," the "discretionary function" exception protects them from liability. *Id.* at 814.

The Gashos contend that once the Assistant United States Attorney informed Customs that his office would not prosecute the Gashos, the agents were foreclosed from pursuing prosecution further. Essentially, their argument is that Customs no longer had "room" to decide whether to prosecute, because the Assistant United States Attorney had already exercised a policy judgment. Our opinion in *Wright* appears to support this view. We stated that an agent's conduct in implementing the decision to prosecute is not immune as a discretionary function. "Unlike the decision to prosecute, an agent's conduct, both before and after that decision is made, is susceptible to judicial evaluation." *Wright*, 719 F.2d at 1035.

Our holding in *Wright* relied on a distinction between the "planning level" and the "operational level" of decision-making. This dichotomy assumed that decisions made by actors at the "operational level" were not immune from liability. *See Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1975). The Supreme Court and this court subsequently rejected this dichotomy as "specious." *Begay v. United States*, 768 F.2d 1059, 1062 n.2 (9th Cir. 1985) (citing *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)). Rather, an act is shielded from liability if judicial second-guessing would interfere with the federal employee's exercise of independent policy judgments. *Mitchell v. United States*, 787 F.2d 466, 468 (9th Cir. 1986), *cert. denied*, 484 U.S. 856 (1987).

[18] In this case, the alleged tortious conduct involved the continued investigation and pursuit of criminal charges after an Assistant United States Attorney had indicated that charges would not be filed. We need not decide whether investigations after a final decision are immune from FTCA liability, as the government's evidence in this case estab-

lishes as a matter of law that the Assistant United States Attorney's decision not to prosecute was not final. Nearly a year after the arrests, the United States Attorney advised the Gashos' attorney that "[w]e have neither made a decision to prosecute nor to decline prosecution . . . *[t]he decision is still being reviewed.*" (emphasis added). There is no genuine issue of fact, because the statement by the Assistant United States Attorney does not contradict the United States Attorney's letter. The statement, issued on the day of the arrests without the benefit of any investigative file, manifestly was a preliminary judgment.[14] Because the evidence establishes as a matter of law that the decision to prosecute was not final, the conduct of the agents in pursuing prosecution is immune. That the conduct of the agents may be tortious or motivated by something other than law enforcement is beside the point, as governmental immunity is preserved "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *Johnson v. United States*, 949 F.2d 332, 340 (10th Cir. 1991).

In summary, the dismissal of the intentional infliction of emotional distress claim is justified to the extent the claim rests solely on circumstances involving seizure of the aircraft and prosecutorial decisions, conduct which falls squarely under FTCA exceptions. However, the Gashos have introduced evidence establishing a genuine issue whether the arrests were motivated by malice. The agents' conduct during the arrest is not entitled to FTCA immunity. We reverse summary judgment on the Gashos' emotional distress claim to the extent it is based on the arrests.

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[14] The government argues that "an *Assistant* United States Attorney seldom has the final say as to whether such prosecutions will be accepted." That may or may not be true, depending on how much the authority the United States Attorney has delegated to his assistants. We choose not to make any such generalized assumption.

IV

The appellants raised an abuse of process claim based on the seizure of the aircraft and the subsequent forfeiture process. The district court dismissed the claim for failure to state a claim upon which relief could be granted. Fed.R.Civ.P. 12(b)(6). The court explained that such a tort under Arizona law must be predicated on misuse of a court's powers, and no judicial process was instituted in this case. A Rule 12(b)(6) dismissal presents a question of law, which we review *de novo. Oscar v. University Students Co-operative Ass'n*, 965 F.2d 783, 785 (9th Cir.)(en banc), *cert. denied*, 113 S.Ct. 655 (1992).

The Gashos contend that the district court misconstrued Arizona law. They also assert that the word "process" is not restricted to the narrow sense of that term. They contend that a claim for abuse of process may lie when the process is administrative. *See, e.g., Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982) (there is "no reason" to distinguish administrative process from judicial process), *cert. denied*, 459 U.S. 1227 (1983).

[19] We need not decide whether, under Arizona law, an abuse of process claim may be based on an administrative abuse. The tortious acts alleged by the Gashos involved detention of goods and merchandise by Customs and, therefore, the claim is barred under the FTCA's exemption for Customs detentions contained in 28 U.S.C. § 2680(c). *See Wright*, 719 F.2d at 1035-36. We affirm the district court's dismissal of the abuse of process claim.

V

We now address the *Bivens* action alleging that Agents Ball, Mannhalter and Howe violated the Gashos' constitutional rights when they seized the aircraft and arrested the Gashos.[15] We resolve two questions: whether the *Bivens*

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[15] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Under *Bivens*, as interpreted in

[cont'd]

claims are barred by 28 U.S.C. § 2676, and whether the agents are entitled to qualified immunity from liability.

A.

The Gashos argue that the district court erred when it dismissed the *Bivens* claims pursuant to 28 U.S.C. § 2676. The district court held that under § 2676, the existence of the prior judgment in the FTCA action barred the *Bivens* claim. Because this issue requires statutory interpretation, we review the district court's decision *de novo*. *Kreines v. United States*, 959 F.2d 834, 836 (9th Cir. 1992).

Section 2676 states that

> [t]he judgment in an [FTCA] action ... shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2676. The district court read the word "judgment" in § 2676 as broadly applying to *all* judgments, both against and in favor of the government. Because a judgment in favor of the government earlier was granted in the Gashos' FTCA action,[16] the district court dismissed the Gashos' *Bivens* action.

[20] The Gashos argue that the word "judgment" in section 2676 is "ambiguous" and "vague" about whether the proviso applies to *all* judgments regardless of outcome or whether it applies only to judgments against the United States. The Gashos urge us to rely on legislative history as a

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Carlson v. Green, 446 U.S. 14 (1980) and *Davis v. Passman*, 442 U.S. 228, 245-48 (1979), a victim of a constitutional violation by a federal agent is entitled to recover money damages from the agent when there is neither a special factor counseling hesitation nor an equally effective alternative remedy.

[16] The district court granted summary judgment on the Gashos' FTCA claims alleging false arrest and emotional distress, and dismissed their abuse of process claim for failure to state a claim.

means of interpreting Congress' intent. They contend Congress intended only to prevent more than one satisfaction of a claim. *See Hearings Before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess. 90 (1942). They argue that section 2676 does not bar a plaintiff from filing another action when the prior action was adjudged in favor of the United States. In essence, the Gashos argue that the quality of an FTCA judgment must determine whether or not a subsequent *Bivens* claim on the same conduct is barred.

Neither this circuit nor any other circuit has squarely decided this specific question. The Gashos contend that our opinion in *Kreines v. United States*, 959 F.2d 834, 838 (9th Cir. 1992) settles the issue. In *Kreines*, we stated: "The statutory bar [in section 2676] was conceived by Congress primarily to prevent dual *recoveries* arising from additional, subsequent litigation." *Id.* (emphasis added). *Kreines'* broad language arguably supports the Gashos' contention that an action is barred only when the plaintiff has recovered in the judgment. However, the holding in *Kreines* was narrowly confined to its facts. In that case, the plaintiff had filed an FTCA claim and a *Bivens* claim in the *same* action. Judgment was entered first in the *Bivens* claim, and the judgment in the FTCA claim followed a few months later. *Kreines* viewed the claims as "contemporaneous" and therefore held that it was "free, *in this narrow context*, to consider the possibility that the *quality* of the FTCA judgment may have a bearing on its effect on contemporaneous judgments." (emphasis added). Relying on legislative history, *Kreines* concluded that the bar to any later "action" was to prevent "dual recoveries" in separate litigation. *Id.* The court therefore held that an FTCA judgment in favor of the government did not bar the *Bivens* claim when the judgments are "contemporaneous" and part of the same action. *Id.* In the Gashos' case, the *Bivens* claims were in an action entirely apart from the action containing the FTCA claims. Limited by its facts, *Kreines* is not controlling.

[21] We are not persuaded that Congress intended to permit a claimant to have a second chance after losing his FTCA action. The first and best guide on Congress' intent is the plain language of the statute. *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940). The statute speaks of "judgment" and suggests no distinction between judgments favorable and judgments unfavorable to the government. The language is not "ambiguous" or "vague." *See Leaman v. Ohio Dept. of Mental Retardation*, 825 F.2d 946 (6th Cir. 1987) (interpreting Ohio Court of Claims Act and stating in dictum that similar provision in section 2676 provides that "even adverse judgments" in favor of the government bar subsequent recovery against employees), *cert. denied*, 487 U.S. 1204 (1988).

[22] The legislative history does not contradict our interpretation of the statute. *Kreines'* analysis of legislative history unearthed two concerns by Congress: the prevention of dual recoveries *and* the prevention of multiple lawsuits. *Id.; see Hearings on H.R. 5373 and H.R. 6463, supra*, at 9 ("If the government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it.") (statement of Francis Shea, Assistant Attorney General). The risk of dual recovery is absent here because the Gashos did not prevail on their FTCA claim. The prevention of dual recovery, however, is not the only purpose of the statute. Congress also was concerned about the government's ability to marshal the manpower and finances to defend subsequent suits against its employees. One witness testified that multiple suits imposed a "very substantial burden" on the government. *Id.* This suggests that Congress never intended to draw a distinction based on whether the government prevailed or not. We therefore hold that *any* FTCA judgment, regardless of its outcome, bars a subsequent *Bivens* action on the same conduct that was at issue in the prior judgment.

Our interpretation of § 2676 serves the interests of judicial economy. Plaintiffs contemplating both a *Bivens* claim and an FTCA claim will be encouraged to pursue their

claims concurrently in the same action, instead of in separate actions. This will foster more efficient settlement of claims, since the evidence and proof in FTCA and *Bivens* claims often overlap.

[23] The *Bivens* claims based on the seizure of the aircraft are barred. Because we have affirmed the district court's judgment in favor of the United States in the FTCA claims involving the seizure of the aircraft, that prior judgment precludes any subsequent *Bivens* claim based on the seizure.[17] *See* 28 U.S.C. § 2676 (prior judgments bar subsequent claims "by reason of the same subject matter"). Because we have reversed the district court's summary judgment on the FTCA claim involving the arrests, a prior "judgment" no longer bars the subsequent *Bivens* claim based on the arrests. The Gashos thus are permitted to pursue either the *Bivens* claim or FTCA claim, or both claims. If they pursue both remedies in separate actions, they may secure judgments on both claims only if the *Bivens* judgment is entered first. *See Ting v. United States*, 927 F.2d 1504, 1513 n.10 (9th Cir. 1991).

B.

The defendants argue that they are entitled to qualified immunity from damages caused by the arrests. We review qualified immunity *de novo*. *Baker v. Racansky*, 887 F.2d 183, 185 (9th Cir. 1989).

The doctrine of qualified immunity assumes that police officers do not knowingly violate the law. An officer thus is presumed to be immune from any damages caused by his

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[17] We reject the appellants' argument that the dismissal of the abuse of process claim for failure to state a claim is not a "judgment" on the merits under 28 U.S.C. § 2676. *Cf. Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) (Rule 12(b)(6) dismissal is final for purposes of res judicata). In any case, the claim is barred by the Customs exception of 28 U.S.C. § 2680(c).

constitutional violation. *Elder v. Holloway*, 975 F.2d 1388, 1392 (9th Cir. 1991), *rev'd on other grounds*, 114 S.Ct. 1019 (1994). To overcome this presumption, a plaintiff must show that the officer's conduct was "so egregious that any reasonable person would have recognized a constitutional violation." *Id.* at 1394 (quoting *Backlund v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985)).

We employ a two-step inquiry to determine whether a reasonable person would have recognized that a constitutional right was being violated. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). The plaintiff first must show that the constitutional right is clearly established. *Elder*, 975 F.2d at 1392. If the plaintiff makes that showing, the burden shifts to the defendant to show that a reasonable police officer could have believed, in light of the settled law, that he was not violating a constitutional or statutory right. *Morgan v. Woessner*, 997 F.2d 1244, 1260 (9th Cir. 1993), *cert. dismissed*, 114 S.Ct. 671 (1994).

The Gashos contend that the Customs agents arrested them in retaliation for refusing to turn over the logbooks. The Gashos produced evidence that Agent John Howe, who ordered the arrests, later told another Customs official that the Gashos were arrested because the Gashos' refusal to turn over the logbooks "made us mad." The Gashos argue that an arrest for their refusal to turn over the logbooks violated their Fourth Amendment rights.

The Fourth Amendment right to be free from arrests without probable cause is clearly established. *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 706 (9th Cir. 1989). Probable cause is obviously lacking when the arrest is motivated purely by a desire to retaliate against a person who verbally challenges the authority to effect a seizure or arrest. *See Houston v. Hill*, 482 U.S. 451, 462-63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."); *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990). Similarly, probable cause

is lacking when an officer arrests a person for refusing to consent to a warrantless search or seizure. *See United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (The "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing."). It is clearly established that a person's Fourth Amendment rights are violated if the sole basis for his arrest is his challenge to the officer's authority absent a warrant.

Our inquiry now turns to whether a reasonable officer could have believed that the arrest of the Gashos was lawful, in light of the clearly established law and the information the arresting officers possessed. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Our prior determination that the arrests lacked probable cause is not necessarily determinative. The agents may still be entitled to immunity even if they mistakenly believed there was probable cause to arrest the Gashos, if they could have reasonably believed that their actions were lawful. *See id.*

[24] The defendants have failed to demonstrate that a reasonable officer could have believed, as a matter of law, that the Gasho's arrests were lawful. Our conclusion rests on the issue of specific intent. The agents argued that they had probable cause to believe that the Gashos intended to frustrate or prevent seizure because: (1) the Gashos were "indisputably and continually aware" that the logbooks were an appurtenance to the aircraft, and (2) the Gashos refused to turn over the logbooks in response to the agents' demands for them. As to the first ground, the agents had no facts to support their belief that the Gashos knew that the logbooks are an appurtenance to the aircraft. Their belief was based on mere supposition. In light of the paucity of facts allowing an inference of specific intent, a reasonable officer would have known that the arrests were without probable cause. As to the second ground, a reasonable officer, in light of the clearly established law, would have known that the Gashos' passive refusal to turn over the logbooks was privileged conduct which could not serve as a

basis for finding criminal intent. The agents are not entitled to qualified immunity. *Cf. Duran*, 904 F.2d at 1377 (officer not immune because criticism of police is not a crime, absent evidence of disorderly conduct).

VI

The judgment of the district court is affirmed in part and reversed in part. We affirm summary judgment on the FTCA and *Bivens* claims based on the seizure of the aircraft. We reverse the dismissal of the FTCA claim based on the intentional infliction of emotional distress. We reserve summary judgment on the FTCA and *Bivens* claims based on the arrests. The case is remanded for further proceedings consistent with this opinion.

REVERSED in part, AFFIRMED in part and REMANDED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JOHN R. GASHO, SR., et al., Plaintiffs,	)	
vs.	)	CIV-92-1211 PHX RCB
WILLIAM BALL, et al., Defendants.	)	**JUDGMENT**

(Filed March 5, 1993)

This action came on for consideration before the Court, the Honorable Robert C. Broomfield, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the complaint and action are dismissed and that plaintiffs take nothing by their complaint. This judgment is in accordance with this Court's order dated March 5, 1993, which grants defendants' motion to dismiss pursuant to 28 U.S.C. 2676.

Dated at Phoenix, Arizona, this 5th day of March, 1993.

RICHARD H. WEARE, Clerk

By: /s/ A.P. JUAREZ
A.P. Juarez, Deputy Clerk

cc: all counsel
CIV-21 (6/5/85)

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JOHN R. GASHO, SR. and SHARON L. GASHO, husband and wife, MILLARDAIR, LTD., a Canadian Corporation,
Plaintiffs,

vs.

WILLIAM BALL, ROGER MANNHALTER, and JOHN J. HOWE, JR.,
Defendants.

No. CIV 92-1211 PHX RCB

ORDER

(Filed March 5, 1993)

This is the second case brought by these plaintiffs arising out of their arrest at the Scottsdale Municipal Airpark in 1988. In the previous case, CIV 89-2077 PHX RCB, plaintiffs brought claims against the United States, and the court granted summary judgment in favor of the government. Plaintiffs now assert very similar claims against the individual Customs Service Agents who allegedly falsely arrested the plaintiffs and seized the aircraft in plaintiffs' possession. Defendants have moved to dismiss plaintiffs' claims or, in the alternative, for summary judgment. The court heard oral argument on the motion on February 23, 1993, and now rules.

BACKGROUND

The facts that give rise to this action are set forth fully in the court's order of July 24, 1991, which granted summary judgment to the United States on most of plaintiffs' claims. A brief summary of the facts is as follows.

The defendant government agents in this case seized a DC-3 airplane in Scottsdale, Arizona on June 24, 1988, allegedly for displaying false registration markings. The agents also arrested the Gashos, who were in possession of the airplane, after the Gashos refused to turn over the airplane's logbooks. At the time of the seizure of the plane and the arrest of the Gashos, the Gashos were en route to Canada to deliver the airplane to Millardair, a corporation that had purchased the plane from the Gashos' restoration company in Tucson. Plaintiffs never were prosecuted for any wrongdoing.

In December of 1989, plaintiffs brought suit against the United States, Ball, Mannhalter, and Northrop Worldwide Aircraft Services, Inc., alleging false imprisonment, false arrest, intentional infliction of emotional distress, breach of contract, and claims under the Fourth Amendment. Plaintiffs later added a claim for abuse of process. Plaintiffs complained that they wrongfully had been arrested without probable cause and that the Customs Service had refused to return the aircraft solely to coerce the plaintiffs into entering into a hold harmless agreement with the Customs Service.

The claims against defendants Ball and Mannhalter were dismissed on August 15, 1990 pursuant to Rule 4(j), Federal Rules of Civil Procedure, because plaintiffs had failed to accomplish service within 120 days. The claims asserted against the other parties all were dismissed in a series of orders by the court. Plaintiffs have appealed the judgments dismissing their claims to the Ninth Circuit.

On June 24, 1992, plaintiffs filed their complaint in this case against Ball, Mannhalter, and John Howe, Jr. By the time plaintiffs filed their complaint, all of plaintiffs' claims in the previous case had been dismissed except for plaintiff Millardair's abuse of process claim against the government.[1]

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[1] Pursuant to the government's motion, the court dismissed Millardair's abuse of process claim on August 26, 1992.

The defendants have moved to dismiss or, in the alternative, for summary judgment on plaintiffs' entire complaint. The primary basis for defendants' motion is that 28 U.S.C. § 2676 bars this action. Section 2676 states:

> The judgment in an action under section 1346(b) [the FTCA] shall constitute a complete bar to an action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Based on this provision, defendants argue that the court's judgment in plaintiffs' previous FTCA action against the government precludes this action. Plaintiffs do not dispute defendants assertion that this case involves the same subject matter as the prior FTCA action against the government.

Defendants also argue at length that this action should be dismissed under the doctrine of qualified immunity. Pursuant to the qualified immunity doctrine, defendants contend that they are immune from suit to the extent they reasonably could have believed that probable cause existed to arrest the Gashos and seize the airplane. Defendants assert that the qualified immunity issue is effectively predetermined given this court's holding in the prior case that probable cause in fact existed to arrest the plaintiffs. In addition, defendants maintain that the doctrine of collateral estoppel prevents plaintiffs from rearguing the issue of probable cause in this case.

Plaintiffs contend that section 2676 does not bar this action because the government won the prior FTCA suit. According to plaintiffs, the primary purpose underlying section 2676 is to prevent double recovery by plaintiffs. Double recovery, plaintiffs note, is not possible when judgment is entered in favor of the government in the initial suit. Plaintiffs assert that, therefore, section 2676 should be interpreted consistently with the statute's primary purpose.

With respect to defendants' assertion of qualified immunity, plaintiffs argue that extension of qualified immunity is not appropriate because the officers could not reasonably

have believed that Sharon Gasho had the requisite intent to steal property from the custody of the Customs Service. *See* 18 U.S.C. § 549.[2] With respect to defendants' claim that the doctrine of collateral estoppel precludes plaintiffs from contesting that probable cause existed to arrest the Gashos, plaintiffs assert that preclusion is not proper because this court's rulings in the prior case currently are on appeal.

Finally, plaintiffs move pursuant to Rule 56(f) of the Federal Rules of Civil Procedure for more time to conduct discovery. Plaintiffs submit that they believe that the defendants were involved in the decision of the Customs Office to retain custody of the airplane in an attempt to obtain a hold harmless agreement from the plaintiffs. Plaintiffs contend that limited discovery into the defendants' involvement in withholding the airplane while seeking the hold harmless agreement should be permitted before the court rules on defendants' summary judgment motion.

ANALYSIS

Defendants argue that section 2676 expressly precludes subsequent actions against government employees which follow judgments in cases against the United States. Defendants further argue that the statute makes no distinction between judgments in favor of the United States and judgments against the United States, and that Congress likely did not make such a distinction because Congress intended to prevent multiple lawsuits as well as double recoveries.

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[2] The court rejected this argument in its July 24, 1991 order in the prior FTCA case. The court held that even assuming that defendants did not have probable cause to arrest plaintiffs pursuant to 18 U.S.C. § 549, the officers did have probable cause to arrest the plaintiffs for violations of other federal statutes. The court then held that, to the extent probable cause existed to arrest the Gashos pursuant to 18 U.S.C. §§ 2232, 2233, defendants' arrest of plaintiffs was privileged even if the arrest was motivated in part by anger or by reliance on the wrong federal statute. *See* Order of July 24, 1991 at 11-14.

Plaintiffs argue that the dominant purpose underlying section 2676 is to prevent multiple recovery. Plaintiffs contend that because the multiple recovery concern is not implicated when judgment is entered in favor of the United States, plaintiffs claims as asserted in this action should not be barred.

Case law on the issue before the court is very sparse. Plaintiffs cite three cases to support their position. The case most helpful to plaintiffs is *Brown v. United States*, CV 83-1566 (D.N.J. June 12, 1987). The court in *Brown* held that section 2676 bars actions against a government employee only if a prior judgment has been obtained against the government relating to the same subject matter. This interpretation of section 2676 comports with the interpretation which plaintiffs in this case advance. The *Brown* court, however, provided absolutely no legal citation or reasoning for its conclusion.

The second case relied upon by plaintiffs is the Ninth Circuit's decision in *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992). In *Kreines*, a plaintiff brought suit contemporaneously against federal officers under a *Bivens* theory and against the government under the FTCA. A jury found in favor of the plaintiff on her *Bivens* claim but the trial judge later found in favor of the government on plaintiff's FTCA claim. *Id.* at 836. The individual defendants held liable under the *Bivens* theory then sought to vacate the judgment against them based on the court's entry of judgment on the FTCA claim.

On appeal, the Ninth Circuit phrased the question before the court as "whether § 2676 applies when the judgment on the FTCA claim (a) has become final contemporaneously with the judgment on a *Bivens* claim . . . and (b) has been favorable to the government." *Id.* at 838. The defendant in the case relied upon the Ninth Circuit's prior decision in *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987), which barred a contemporaneous *Bivens* judgment against a federal employee when the plaintiff prevailed on his FTCA claim against the government. As plaintiffs note, the Ninth

Circuit in *Kreines* distinguished *Arevalo* on the ground that in *Kreines* the government had prevailed in the FTCA action.

The *Kreines* court justified the distinction it drew between judgments favorable to the government and judgments against the government as follows:

> [The defendants] also argue that our distinction between judgments favorable and judgments unfavorable to the government is inconsistent with the plain language of § 2676, which only speaks in terms of "judgments." That argument ignores the requirement that the statute be read as a whole. The statute states that an FTCA judgment bars an "action." The text is ambiguous on the question of whether an FTCA judgment favorable to the government bars a contemporaneous *Bivens* judgment. We are thus free, in this narrow context, to consider that the possibility that the *quality* of the FTCA judgment may have a bearing on its effect on contemporaneous judgments.
>
> We resolve the ambiguity by reference to the intent of Congress. The statutory bar was conceived by Congress primarily to prevent dual recoveries arising from additional, subsequent litigation.

Id. Thus, the holding in *Kreines* is narrow: the decision states only that the quality of the FTCA judgment is relevant when judgments are entered contemporaneously on claims against the government under the FTCA and against the individual employee. This case, of course, does not involve contemporaneous judgments, but instead involves multiple suits or actions. Importantly, the court made clear that "Congress' primary concern in enacting the bar was to prevent multiple lawsuits on the same facts." *Id.* As such, *Kreines* provides relatively little support to plaintiffs in this case.

The third case relied upon by plaintiffs also does not provide significant support for their case. In *Dagnan v. Douger*, CV 1-88-452 (E.D. Tenn. July 19, 1989), the plain-

tiff brought suit against the United States, and a federal district court entered judgment in favor of the government on the ground that the plaintiff's claim fell within the intentional tort exception to the FTCA, 28 U.S.C. § 2680(h). The plaintiff then brought suit against the individual government employee.

The government argued that plaintiff's second suit was barred under section 2676. The Magistrate Judge disagreed, finding no authority for the proposition that the dismissal of a case against the government that is not on the merits is sufficient to preclude a later case against the individual government employee. The court did not comment, however, as to whether dismissal would have been appropriate had the prior action against the government been resolved on its merits.

After reviewing the relevant authorities, the court concludes that dismissal of plaintiffs' claims is necessary under section 2676. In reaching this decision, the court has analyzed the plain language of the statute, the statute's legislative history, as well as relevant case law.

The court does not find the language of section 2676 to be ambiguous. Neither the specific language nor the structure of section 2676 or the FTCA even hints that the term "judgment" should be read as meaning "judgment against the United States." A judgment presumably means any judgment. If Congress was concerned only about preventing double recovery, it very easily could have written the statute to apply exclusively to situations in which a plaintiff has obtained a judgment against the government.

Plaintiffs' position necessarily relies upon Congress' intent when enacting section 2676. Plaintiffs contend that the primary purpose of section 2676 is to prevent multiple recovery and that, therefore, no statutory preclusive effect should be given to judgments in favor of the government.

Plaintiffs' position fails to recognize that the real question before the court is not whether Congress was concerned with double recovery, but whether Congress *also* was con-

cerned about multiple suits. If the term judgment means any judgment, then the statute addresses double recovery concerns as well as multiple suit concerns. To the extent that Congress intended the statute to address both these concerns, plaintiffs claims in this case are barred.

In *Kreines,* the Ninth Circuit stated that "Congress' primary concern in enacting [section 2676] was to prevent multiple lawsuits on the same facts." *Kreines,* 959 F.2d at 838. As stated, the statute's terms on their face clearly evince a concern for preventing multiple suits, particularly second suits brought against individual government employees. In short, no incongruity exists between the terms of the statute and the statute's primary purpose as expressed by the Ninth Circuit.[5]

Furthermore, the decision reached by the court appears to be in accord with the weight of the admittedly sparse case law on this subject. *See Van Brocklin v. McGinley,* CV 82-712 (E.D. Cal. Dec. 19, 1989) (holding that it is irrelevant whether the government prevailed in the initial action); *Wilkinson v. FBI,* CV 80-1048 (C.D. Cal. Oct. 22, 1986) (same); *see also Leaman v. Ohio Dep't of Mental Retardation,* 825 F.2d 946, 955 (6th Cir. 1987) (stating in dicta: "[Anyone] who pursues his statutory remedies against the United States [under the FTCA] to the point of judgment — even

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[5] Plaintiffs have not relied on the statute's legislative history in their arguments about how the statute should be interpreted. The court nevertheless has searched much of the statute's legislative history and has not found anything to indicate that Congress only was concerned about double or multiple recovery. The little legislative history that the court could find on the issue makes clear that Congress was particularly concerned about the financial implications of suits against individual government employees. Through section 2676, Congress apparently sought to reduce the amount of claims brought against individual employees. *See Bills to Provide for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the Committee on the Judiciary, House of Representatives,* 77th Cong., 2d Sess. 9, 26, 27, 59 (1942).

an adverse judgment or a judgment for only a small part of the amount claimed — bars himself from any recovery against federal employees."). Because plaintiffs do not dispute that this case involves the same subject matter as the previous action brought by plaintiffs against the government that proceeded to judgment, this case must be dismissed pursuant to 28 U.S.C. § 2676. Further discovery would not allow plaintiffs to avoid the statutory bar. . . .

IT IS ORDERED granting the defendants' motion to dismiss pursuant to 28 U.S.C. § 2676 (Doc. 11).

IT IS FURTHER ORDERED denying plaintiffs' motion for additional time to conduct discovery (Doc. 14).

DATED this 3 day of March, 1993.

/s/ ROBERT C. BROOMFIELD
Robert C. Broomfield
United States District Court

Copies to counsel of record

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JOHN R. GASHO, et ux., et al.,	)	
Plaintiffs,	)	
vs.	)	No. CIV 89-2077 PHX RCB
UNITED STATES OF AMERICA, et al.,	)	**AMENDED JUDGMENT**
Defendants.	)	

(Filed November 2, 1992)

This action came on for consideration before the Court, the Honorable Robert C. Broomfield, United States District Court Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the action and Complaint are hereby dismissed and that Plaintiffs take nothing by their Complaint. This Judgment is in accordance with this Court's Order dated July 29, 1991, which dismissed the Plaintiffs' claims for false arrest, intentional infliction of emotional distress, and breach of contract, this Court's Order dated March 25, 1992, which dismissed Plaintiff Gashos' abuse of process claim and this Court's Order dated September 1, 1992, which dismissed Plaintiff Millardair's claim for abuse of process.

DATED at Phoenix, Arizona, this 27 day of October, 1992.

By: /s/ ROBERT C. BROOMFIELD
U.S. District Judge

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JOHN R. GASHO, SR. and SHARON GASHO, et al., *Plaintiffs*	)	
vs.	)	No. CIV 89-2077 PHX RCB
UNITED STATES OF AMERICA, et al., *Defendants.*	)	ORDER

(Filed March 25, 1992)

By order dated July 24, 1991, the court dismissed all claims by John and Sharon Gasho against the United States ("defendant") except the claim for abuse of process asserted in count three of the second amended complaint. Defendant now moves for dismissal of plaintiffs' abuse of process claim[1] for failure to state a claim and for lack of standing. The Gashos have responded to the motion but defendant did not reply. Neither party requested oral argument.

As more fully recounted in the court's prior order, this action arises out of defendant's seizure of a DC-3 airplane in Scottsdale, Arizona on June 24, 1988 for displaying false registration markings. The agents also arrested the Gashos after they removed the logbooks from the aircraft and refused to release them to Customs agents. At the time of the seizure and arrests, the Gashos had stopped over in

[1] Count three also asserts an abuse of process claim by plaintiff Millardair, Inc. but this motion is not directed to Millardair's claim.

Scottsdale while en route to Canada to deliver the airplane to Millardair, a Canadian corporation, which had recently purchased the aircraft from the Gashos' aircraft restoration company.

Plaintiffs allege in count three of the complaint that the Customs Service became aware shortly after seizing the aircraft that no basis existed for the seizure or for continued retention of the airplane and that they nevertheless continued to detain the aircraft in order to obtain settlement or release from civil liability for the wrongful arrest of the Gashos and wrongful seizure of the aircraft. Complaint ¶¶ 57 & 58, 61. Further, the complaint alleges that the Customs Service referred the matter to the United States Attorney for prosecution and that even after the United States Attorney "refused to institute judicial forfeiture proceedings and recommended to Defendant United States Customs Service that the aircraft be released," the Customs Service refused to release the aircraft "for a significant and appreciable period of time."[2] *Id.* ¶ 59 & 60. The complaint asserts that the plaintiffs suffered mental and physical harm as a result of the wrongful detention and that Millardair was deprived of the use of the aircraft and revenues it would have generated during the period of detention. *Id.* ¶ 62.

Defendant asserts two grounds for dismissal of the Gashos' claim of abuse of process: that the Gashos cannot state an abuse of process claim because no judicial proceeding was ever instituted, and that the Gashos lack standing to assert an abuse of process claim because they had no interest in the aircraft that was seized. Having considered the parties' written submissions and the authorities cited therein, the court will grant defendant's motion.

Defendant contends that the Gashos cannot state an abuse of process claim because they have not alleged the

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[2] Defendant asserts that the airplane was released approximately six weeks after the United States Attorney notified that Customs Service that it would decline to commence a forfeiture proceeding. Motion at 2 n.1.

misuse of any judicial process as required under Arizona law. Defendant asserts that a warrantless seizure and detention of property does not constitute judicial process because it does not invoke the power of the courts. The Gashos response by arguing essentially that they have alleged abuse of a "legal process" as required to state a claim for abuse of process under Arizona law because "the forfeiture process is prescribed by statute and regulation" and includes both administrative and judicial components.

The court concludes that the Gashos cannot state a claim for abuse of process on the facts of this case. Arizona courts interpret the element of misuse of "legal process" identified by the Restatement (Second) of Torts § 682 to mean "judicial process." *See, e.g., Morn v. City of Phoenix,* 152 Ariz. 164, 166, 730 P.2d 873, 875 (App. 1986); *Nienstadt v. Wetzel,* 133 Ariz. 348, 353, 631 P.2d 876, 881 (App. 1982). Under Arizona law, an abuse of process claim must be based upon allegations of misuse of the power of a court. For example, in the Arizona decision most closely analogous to the facts of this case, the court dismissed an abuse of process claim predicated upon an alleged wrongful filing of a lis pendens, rejecting the plaintiff's argument that a lis pendens implicates judicial process by providing notice of the claims in a lawsuit. *Gray v. Kohlhase,* 18 Ariz. App. 368, 502 P.2d 169, 172-73 (1972). The court in *Kohlhase* relied upon a California decision which held that "'[T]he essence of the tort "abuse of process" lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.'" *Id.* (quoting *Meadows v. Bakersfield Savings & Loan Ass'n,* 250 Cal. App.2d 749, 59 Cal. Rptr. 34 (1967). *See also Rondelli v. County of Pima,* 120 Ariz. 483, 586 P.2d 1295, 1301 (App. 1978) ("'[The tort of abuse of process] is an act done under the authority of the court for the purpose of perpetrating an injustice. . . .'") (citation omitted).

As plaintiff notes, "process" in the context of abuse of process claims is more broadly defined than the restrictive

statutory definition.[5] *Nienstedt v. Wetzel*, 651 P.2d at 880. The definition of "process" in the abuse of process context, however, still is limited to "procedures incident to the litigation process," such as noticing depositions, entry of default and filing various types of motions. *Id.* at 880-81.

The only decision cited by either party or of which the court is aware that concerns an abuse of process claim in the context of a seizure is the case noted in the court's previous order, *Blue Dolphin, Inc. v. United States*, 666 F. Supp. 1538, 1541 (S.D. Fla. 1987). The court in *Blue Dolphin* stated flatly that no abuse of process may be claimed unless the act complained of "results in issuance of some form of process from the *Court*." *Id.* Further, the court limited such claims to allegations of improper use of court process "*after* suit has been legally filed." *Id.*

The court concludes that the Gashos have failed to state a claim for abuse of process. The Gashos themselves recognize that the United States Attorney did nothing more than review and investigate this matter after referral by the Customs Service, Response at 4, and that he thereafter "refused to institute judicial forfeiture proceedings." *Id.*; Complaint ¶ 60. The Gashos provide no authority to support their contention that the definition of "process" in the context of an abuse of process claim should be expanded to include administrative actions undertaken pursuant to statute or regulation. Having determined that the Gashos' abuse of process claim must be dismissed for failure to state a claim, the court need not and does not reach the question of whether the Gashos sustained sufficient harm as a result of the alleged wrongful detention to have standing to assert such a claim.

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[5] "Process" is defined for statutory purposes as "a citation, writ or summons issued in the course of judicial proceedings." A.R.S. § 1-215(26).

IT IS ORDERED granting defendants' motion to dismiss the Gasho's claim of abuse of process (Doc. No. 72).

DATED this 23 day of March, 1992.

/s/ ROBERT C. BROOMFIELD
Robert C. Broomfield
United States District Court

Copies to all parties of record

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JOHN R. GASHO, SR. and Sharon Gasho, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.

No. CIV 89-2077 PHX RCB

ORDER

(Filed July 29, 1991)

This is an action against the United States under the Federal Tort Claims Act ("FTCA") for false arrest/false imprisonment, intentional infliction of emotional distress and abuse of process, and under the Tucker Act for breach of contract; and against defendant Northrop Worldwide Aircraft Services, Inc. for negligence. The United States ("defendant") moves for summary judgment dismissing those counts of the second amended complaint that are asserted against the United States. The matter has been fully briefed and the court has heard oral argument.

I. *FACTS*

This action arises out of the seizure by the United States Customs Service of a DC3 airplane and the arrest of plaintiffs John and Sharon Gasho. The Gashos, owners of an aircraft restoration company in Tucson, flew the aircraft to Scottsdale Municipal Airport (referred to by plaintiffs as the "Scottsdale Airpark") on June 24, 1988. The purpose for bringing the aircraft to Scottsdale was to convert its registration from U.S. to Canadian, preparatory to its delivery to a Canadian purchaser, defendant Millardair, Ltd.

The Gashos met with Federal Aviation Administration ("FAA") Inspector John Zarcone, who issued the documents required for de-registration and exportation of the airplane. The Gashos and Zarcone then removed the American registration number from the airplane and Canadian registration markings were affixed to the airplane.

At approximately 3:30 p.m. the same day, an air traffic controller notified William Gately, a Customs Service Resident-Agent-in-Charge ("RAC"), of the change in the aircraft's registration markings. Gately dispatched two customs officers, Special Agents William Ball and Roger Mannhalter, to investigate. Gately testified that he also telephoned Corporal Karol Waversfeld of the Royal Canadian Mounted Police ("RCMP") and learned that the Canadian registration markings were invalid. Waversfeld testified, however, that he learned from Lorraine Gray of the Canadian Transport Ministry that an application had been received for obtaining Canadian registry on the aircraft but the process was incomplete and the numbers could not yet be used. Waversfeld stated that he conveyed this information to Gately or his representative.

Evidence concerning the date and time of these telephone calls is conflicting. Defendants assert that the Canadian registration markings were determined to be invalid prior to the time Gately and his superiors decided to seize the aircraft on June 24, the same day the airplane arrived in Scottsdale. Plaintiffs cite the deposition testimony of Waversfeld and Gray, which suggests that Waversfeld, and consequently Gately, did not learn of the status of the registration numbers until at least the next day.

Upon being dispatched by RAC Gately to investigate the change in registration reported by the air traffic controller, Special Agents Ball and Mannhalter went to the airport where they learned the identity of the Gashos and where they were staying. The agents then confronted the Gashos in their hotel room. The Gashos explained that they had obtained de-registration documents from the FAA and that they had received the Canadian registry markings from the

airplane's new owner, Millardair. Agent Bell nevertheless read John Gasho his Miranda warnings. Gasho then called his daughter Pamela Vining, a Phoenix attorney, and she came to the hotel. The Agents, the Gashos and Vining then went to the airport to obtain the FAA documentation the Gashos had described to the agents.

At the airport, the Gashos gave the agents the documents issued by FAA Inspector Zarcone. The documents referred to the airplane by the Canadian registration markings displayed on the airplane but did not purport to verify that the marks had been properly issued by the Canadian Transport Ministry. One of the documents in fact required the owner to confirm the validity of the marks under the applicable foreign law. At some point before seizure of the aircraft, both Agent Bell and John Gasho tried but failed to reach Zarcone by telephone.

The agents then seized the aircraft by placing a lock on one of the propellers. Prior to securing the airplane, the agents allowed the Gashos to remove their personal property. Sharon Gasho removed several items, including the airplane's logbooks, which she placed in Vining's car. Sharon Gasho told John Gasho in front of the agents that she had taken the logbooks. The parties disagree as to whether the agents reacted immediately to that information but at any rate, the agents eventually demanded that the logbooks be returned. The Gashos initially refused to turn the logbooks over to the agents. The agents threatened either the Gashos, Vining or all three with arrest if they persisted in refusing to turn over the logbooks.

The Gashos then went to the Scottsdale Aviation Center and called the Scottsdale Police. Several officers responded but did not intervene in the dispute.[1] Vining then requested an opportunity to talk with the Gashos privately and they were allowed access to a private office. After a brief period,

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[1] Defendants assert that the police officers joined the customs agents in advising the Gashos to turn over the logbooks, but the testimony cited does not support that assertion.

the agents sought entry to the office. The parties disagree as to whether Vining and the Gashos refused the agents entry. Eventually, the agents entered with a key and placed the Gashos under arrest. The agents handcuffed the Gashos, lead them through the lobby of the aviation center out to the parking lot, placed them in the Scottsdale Police squad car and transported them to the Maricopa County Jail on Madison Street.

During the booking procedure, Agent Mannhalter received a call from his superior, Agent Howe, informing him that Assistant United States Attorney Robert Colosi would decline to prosecute and had directed that the Gashos be released. Howe nevertheless directed Mannhalter to fingerprint and photograph the Gashos and inform them that the Customs Service would seek criminal prosecution. A Customs Service Pilot, David Kunz, testified that Howe told him the next day that criminal prosecutions would be pursued to protect the Customs Service in the event the Gashos brought a civil action against it. The United States Attorney subsequently confirmed that the Gashos would not be prosecuted, which was conveyed to the Gashos' attorneys by letter dated October 27, 1989. Plaintiffs' Statement of Facts, Exhibit 19.

Carl Millard, president of Millardair, completed the process for obtaining Canadian registry several weeks after the events of June 24, 1989 and then petitioned the Customs Service to release the aircraft. The Customs Service initially attempted to obtain hold harmless agreements from plaintiffs in exchange for release of the aircraft but plaintiffs refused to execute the agreements. The Customs Service also served John Gasho with a notice of seizure of the aircraft but the United States Attorney subsequently declined to pursue a forfeiture action. Millard finally obtained the aircraft from the Customs Service in December 1988. Millardair alleges that the aircraft was damaged by defendant Northrop while in the custody of the Customs Service.

II. *ANALYSIS*

Plaintiffs initially brought both common law and constitutional law claims against Customs Service Special Agents Ball and Mannhalter and asserted a claim for damages against Northrop Air, without specifying the legal grounds. Plaintiffs subsequently amended the complaint to allege claims of negligence against Northrop and a breach of contract claim against the United States, both based upon allegations of damage to the aircraft while in custody.

On August 15, 1990, the court substituted the United States for defendants Ball and Mannhalter on the common law claims under the FTCA and dismissed the constitutional tort claims for failure to effect service within 120 days as required by Fed. R. Civ. P. 4(j). Plaintiffs suqsequently amended the complaint to conform to the order of substitution and added a claim against the United States for abuse of process. The United States moves for summary judgment dismissing those counts of the second amended complaint that assert claims against the United States.

A. *Count One: False Arrest/False Imprisonment*

Defendant seeks dismissal of count one on the grounds that the Customs Service agents arrested the Gashos with probable cause to believe they had violated federal statutes, and that probable cause is an absolute defense to an action for false arrest or false imprisonment under Arizona law. Plaintiffs do not dispute and the court agrees that probable cause is a complete defense to this claim.[2] *Hockett v. City of Tucson*, 139 Ariz. 317, 320, 678 P.2d 502, 505 (App. 1983). Plaintiffs argue, however, that a question of fact exists as to whether the Gashos were arrested because the agents believed they had violated a statute by taking the logbooks or instead were arrested merely because the Gashos had an-

[2] Defendant also cites A.R.S. § 5-112.01 as support for this proposition. As plaintiffs note, however, that statute is limited to suits brought by persons "suspected of wagering violations" as thus is not applicable in this case.

gered the agents and because the agents needed to create a defense to any ensuing civil action the Gashos might bring.

Defendant asserts that the agents had probable cause to seize the aircraft because, in light of the report from Canadian authorities that the airplane's registration markings were invalid, the markings constituted a "suspicious object" that indicated a violation of 49 U.S.C. § 1472(b). *Texas v. Brown*, 460 U.S. 730, 733, 103 S. Ct. 1535, 1541, 75 L.Ed.2d 502 (police may seize suspicious object in plain view if perceived while officers engaged in lawful activity). Defendant contends that probable cause to seize the aircraft extended to the logbooks because they contained evidence that would identify its origin and owner. Finally, defendant asserts that, whether or not the seizure of the aircraft was lawful, the agents had probable cause to arrest the Gashos for violation of 18 U.S.C. § 2232 and § 2233, which prohibit interference with the seizure of property by persons authorized to make searches and seizures.[5] The seizure need not have been lawful for such interference to constitute a violation of these statutes. *United States v. Gibbons*, 331 F. Supp. 970, 971-72 (D. Del. 1971), *aff'd* 463 F.2d 1201 (3rd Cir. 1971).

Plaintiffs argue that a genuine issue of fact exists as to whether defendant's agents arrested the Gashos on proba-

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[5] Section 2232 provides for the assessment of a fine or imprisonment against any who "before, during, or after seizure of any property by any person authorized to make searches and seizures, in order to prevent the seizure or securing of any goods, wares, or merchandise by such person . . . destroys, or removes the same . . .." 18 U.S.C. § 2232.

Section 2233 provides for similar penalties against anyone who forcibly "attempts to rescue or dispossess any property, articles, or objects after the same shall have been taken, detailed or seized by any . . . person authorized to make searches and seizures." 18 U.S.C. § 2233.

ble cause that they had violated a statute,[4] as defendant contends, or whether the real reason the Gashos were arrested was that they had angered the agents and the agents wanted protection in the event the Gashos filed a lawsuit against the agency. Plaintiffs cite the deposition testimony of Customs Service Pilots David Kunz and Will Willbanks. Kunz testified from notes concerning his conversation on June 25, 1988, the day following the Gashos' arrest, with John Howe that indicated the Gashos were arrested because they made the agents mad and that the criminal prosecution would be pursued to provide protection from any subsequent lawsuit. Willbanks testified concerning his misgivings about the arrest of the Gashos at the time it occurred and his attempt to distance himself from that event. He also testified that he told Agent Mannhalter prior to the Gashos' arrest that the logbooks "weren't a big issue [because] Customs would not put that aircraft in service." Plaintiffs Statement of Facts, Exhibit 13 at 68. Plaintiffs also cite the deposition of Agents Ball and Mannhalter indicating that neither initially attempted to stop Sharon Gasho from removing the logbooks or placing them in Vining's car.

The evidence plaintiffs cite, construed in the light most favorable to plaintiffs, would not prevent defendant from asserting the defense of probable cause of violation of

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[4] Plaintiffs also contest defendant's claim that it had probable cause to seize the aircraft based on information that the Canadian registration markings were invalid. Plaintiffs cite the deposition testimony of RCMP Cpl. Waversfeld and Lorraine Gray of the Canadian Ministry of Transport which suggests that Waversfeld did not learn until the day after the Gashos were arrested that the Canadian registration markings were not yet authorized. Thus, plaintiffs argue that the agents could not have received information that the numbers were invalid prior to arresting the Gashos as defendant claims. Plaintiffs concede, however, that this court need not determine whether the aircraft was lawfully seized in order to determine whether the agents had probable cause to arrest the Gashos under 18 U.S.C. § 2232 or § 2233.

sections 2232 and 2233. First, even if the agents arrested the Gashos out of anger, as the testimony of Kunz and Willbanks indicates, the arrest would still be privileged if supported by probable cause. An arrest is privileged only if the arresting officer's purpose is to bring the offending party before a person or body charged with enforcing the law. Restatement (Second) of Torts § 127. Evidence that defendant's agents attempted to book the Gashos indicates they did have such a purpose. The booking process was terminated when the agents learned the United States Attorney had decided not to prosecute but the prosecutor's subsequent decision is not relevant to whether the agents had the purpose at the time of the arrest to bring the Gashos before a court of law. *See Hockett v. City of Tucson*, 138 Ariz. 317, 320, 678 P.2d 502, 505 (App. 1983) ("Probable cause to make an arrest may exist despite the fact that the charges are subsequently dismissed or the accused is found to be innocent.") In addition, an arrest made for a proper purpose is not unprivileged because of any "ulterior motive" the arresting officer may have in making the arrest, such as a grudge against the person arrested. Restatement (Second) of Torts § 127 comment a. "[A] bad faith motive to 'get' a suspect is irrelevant if the arrest is supported . . . by the existence of probable cause . . .." *Smith v. Gonzales*, 670 F.2d 522, 527 (5th Cir. 1982), *cert. denied* 459 U.S. 1005 (1982).

The fact that the agents did not immediately react upon learning that the logbooks had been removed from the aircraft does not necessarily indicate they did not at some later point realize that removal of the logbooks violated a statute. At that point, the agents had probable cause to arrest the Gashos for refusing to release the logbooks.

Plaintiffs cite as additional evidence that the Gashos were not arrested on probable cause, the booking records and testimony of the arresting agents which indicates the Gashos were arrested on suspicion of violating 18 U.S.C. § 549, which prohibits theft from the custody of the Customs Service, and not the statutes on which defendant now

bases its claim of probable cause, 18 U.S.C. § 2232 and § 2233. Plaintiffs assert that defendant does not attempt to base its defense of probable cause on section 549 because the agents did not have probable cause to arrest the Gashos for violating that statute. Defendant does not respond to that allegation, apparently conceding that its agents did not have probable cause to arrest under that statute.[5]

Assuming defendant's agents did not have probable cause to arrest the Gashos for violating section 549, the question arises whether a warrantless arrest for violating a statute for which no probable cause existed is nevertheless privileged as long as probable cause did exist for a different statute. Neither party addresses this issue and the Arizona courts have not yet ruled on the specific question presented. The Oregon Court of Appeals addressed a similar question, however, holding that where the an officer's subjective basis for arresting a defendant was a warrant intended for someone other than the defendant, the arrest was still privileged against a claim of false imprisonment because probable cause also existed to arrest the defendant for a minor in possession of alcohol offense upon which the defendant was convicted. *Bacon v. City of Tigard*, 81 Or. App. 147, 724 P.2d 885, 886 (1986).

The court in *Bacon* extended to civil actions the rule established in criminal proceedings that "an arrest is deemed valid if the officer had probable cause to make it but also had or stated a reason for the arrest other than the

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[5] In addition, the court notes that the evidence does not appear to support the felonious intent requirement for violation of section 549, *United States v. Slocum*, 708 F.2d 587, 596 (11th Cir. 1983). The court notes, however, that the arrest may have been valid even if the agents were mistaken in believing they had probable cause to arrest the Gashos for violation of section 549. *See Hockett*, 138 Ariz. 15 320, 678 P.2d at 505.

offense for which probable cause existed." *Id.* at 886 n.1. The court reasoned:

> The imprisonment could not be 'false' if there was *any* 'true' reason for it. It would make little sense for an officer to be immune from a false imprisonment action if he *states* one valid and one invalid reason for an arrest, but to be subject to such an action if he *has* a valid reason but offers a different reason as to the explanation for the arrest. It would also make little sense for plaintiffs in civil false imprisonment actions to be able to avail themselves of a coincidental discrepancy between a valid arrest and an invalid explanation for it, when criminal defendants cannot benefit from an identical coincidence.

Id. at 886. The court finds the reasoning of the Oregon court persuasive on this issue, especially in light of the flexible approach toward determining probable cause taken by the Arizona courts. *See Hansen v. Garcia, Fletcher, Lund and McVean*, 713 P.2d 1263, 1265 (App. 1986) ("Probable cause exists when the arresting officer has reasonably trustworthy information of facts and circumstances sufficient to lead a reasonable man to believe an offense is being or has been committed and that the person to be arrested committed it . . . It is a practical, nontechnical concept . . .."). *See also Reams v. City of Tucson*, 145 Ariz. 340, 343, 701 P.2d 598, 601 (App. 1985).

In sum, even if the court finds the agents were motivated by anger to arrest the Gashos and even if the court assumes the agents did not have probable cause to arrest the Gashos for the reason stated at the time of the arrest, probable cause did exist that the Gashos had violated or were violating 18 U.S.C. § 2232 and § 2233. Such probable cause provides defendant with an absolute defense to the false arrest/false imprisonment claim. Thus, the court will grant defendant's motion to dismiss count one.

B. *Count Two: Intentional Infliction of Emotional Distress*

In count two of the complaint, the Gashos seek damages for intentional infliction of emotional distress arising from their arrest and subsequent threats of and attempts to prosecute them. Defendant initially moved for summary judgment on the assumption that the entire factual basis for this claim was Customs Service agents' referral of a Criminal Investigation Report to the United States Attorney recommending prosecution alleged in paragraph 51 of the complaint. Plaintiffs assert in their response, however, that the agents' entire course of conduct, including that described in paragraph 51, forms the basis for the claim as more specifically described in paragraph 54. Paragraph 54 alleges that the agents' conduct, "including but not limited to" the arrest and threats of prosecution, was "in total disregard of the substantial risk of significant harm to Plaintiffs and was motivated by actual malice."

1. Referral for prosecution

Defendant asserts that the Customs agents' referral of their investigative report and recommendation that the Gashos be prosecuted is a discretionary activity which is immune from FTCA liability under 28 U.S.C. § 2680(a). That section excepts from the FTCA "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Decisions concerning whether or not to prosecute a criminal action are inherently discretionary and immune under this exception. *Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983). As defendant argues, immunity under this section has been extended to recommendations of prosecution by agency investigators and even to decisions to initiate a criminal investigation. *Pooler v. United States*, 787 F.2d 868, 871 (3rd Cir. 1986); *Grunnet v. United States*, 730 F.2d 573, 575 (9th Cir. 1984).

Defendant also contends that this count fails to state a claim under Arizona law because it does not allege that the

agents attempted to instigate prosecution of the Gashos with the intent of causing them emotional distress. This count alleges that defendant's agents referred the Criminal Investigation Report to the United States Attorney "for the purpose of attempting to create a defense to any potential civil litigation against the Defendants . . .." Defendant argues that under the rule stated in the Restatement (Second) of Torts § 47, even if the conduct of defendant's agents in referring the report for prosecution were tortious, plaintiffs have not alleged that its purpose was to create emotional distress in the Gashos.

Plaintiffs contend that defendant misreads the complaint in assuming the referral of the criminal report to be the basis of the claims in count two. Yet, plaintiffs purport to respond to defendant's arguments concerning the exception from the FTCA for discretionary decisions, which defendant claims only for decision to refer the matter for prosecution. Plaintiffs also insist that paragraph 54 of the complaint alleges that the conduct described in prior paragraphs was committed with reckless disregard for the risk of harm to the Gashos.

Plaintiffs' arguments do not address the FTCA exception for discretionary activities as applied to the referral for prosecution, but only as applied to communications between the agents and the Gashos. Plaintiffs admit, in fact, that the decision to prosecute is a discretionary function, arguing only that "no cases cited by Defendants support their contention that wrongful *threats* of prosecution are protected by the discretionary acts exception to the FTCA." Response at 30 (emphasis added). Similarly, in applying the first step of the *Berkovitz* analysis, plaintiffs admit that the agent's acts were discretionary because "no federal statute, regulation or policy . . . specifically prescribes or proscribes what a Customs Agents may or may not *say* to a person whom he has wrongfully arrested." Response at 27 (citing *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 535, 108 S. Ct. 1954, 1958, 100 L.Ed2d 531 (1988) (emphasis added). Plaintiffs conclude under step

two of the analysis that the agents' acts were not excepted from the FTCA because no conceivable theory would support "a contention that the *threats* of criminal prosecution made by the Agents to the Gashos are 'grounded in social, economic or political policy.'" *Id.* (emphasis added). Plaintiffs' arguments thus fail to refute defendants' contentions that the agents' referral of the criminal report to the United States Attorney was a discretionary activity which is excepted from FTCA liability under 28 U.S.C. § 2680(a). Based upon the authorities cited by defendant, the court concludes that the referral for prosecution was such a discretionary activity and that plaintiffs cannot recover under the FTCA for any harm caused by such conduct.

2. Seizure of aircraft, arrest and threats of prosecution

Plaintiffs assert in their response that one of the grounds for the intentional infliction claim is the agents' conduct in seizing the aircraft. Defendant contends that seizure of the aircraft cannot form the basis for recovery under the FTCA, because such activity is excepted from the act under section 2680(c). That provision excepts from the FTCA "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs. . .." 28 U.S.C. § 2680(c). Defendant asserts that claims for intentional infliction of emotional distress that arise from Customs' officials' seizure of goods "plainly" falls within this exception. Reply at 6.

Defendant's reliance upon *Vu v. Meese* as support for this proposition is misplaced. The court there denied the defendant's motion to dismiss, holding that an intentional infliction claim does not fall within the section 2680(c) exception. *Vu v. Meese*, 755 F. Supp. 1375, 1386 (E.D. La. 1991). The court reasoned that interpreting the phrase "[a]ny claims," which introduces all the exceptions listed in section 2680, as including intentional acts would obviate the need for the exception provided in section 2680(h) for certain specified intentional acts and make that section mere surplusage. *Id.* Thus, section 2680(c) provides an

exception for claims of negligence arising from customs detentions but that intentional acts must be specifically excepted in section 2680(h). *Id.* The court further determined that, because intentional infliction of emotional distress was not listed in section 2680(h), no exception had been provided for such claims. *Id.*[6] The court finds the reasoning of *Vu v. Meese* persuasive and concurs in the result. Thus, the intentional infliction claim will not be dismissed on the ground that it is exempted from the FTCA by 28 U.S.C. § 2680(c).

The court will nevertheless dismiss the claim for emotional distress to the extent it is predicated upon seizure of the aircraft because the conduct alleged does not provide a basis for such a claim. The Restatement defines the tort of intentional infliction of emotional distress as "extreme and outrageous" conduct that is intended to or recklessly causes severe emotional distress. Restatement (Second) of Torts § 46. The "extreme and outrageous" element of the tort may arise from the actor's abuse of his position of authority over the plaintiff. Restatement (Second) of Torts § 46 comment e. Upon review of the evidence concerning seizure of the aircraft, however, the court finds that no reasonable fact-finder could conclude that the agents abused their authority in seizing the aircraft nor that their actions were intended to cause distress to the Gashos or were in reckless disregard of such an effect.

Before seizing the aircraft, the Customs agents advised the Gashos of their intentions and the grounds for seizure, they gave the Gashos an opportunity to explain the change

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[6] Even if section 2680(h) did provide an exception for intentional infliction of emotional distress, that section specifically provides that the FTCA does apply to such claims if based upon the acts or omissions of "investigative or law enforcement officers of the United States Government," defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h).

in the markings and attempted to confirm the validity of the Canadian registration markings prior to seizing the aircraft. The agents also allowed the Gashos to remove their personal belongings from the aircraft at the time of the seizure. When Mrs. Gasho expressed concern that the agents would damage the propeller in applying the locks, the agents responded by taking steps to prevent such damage. Although some acrimony developed as a result of the Gashos' resistance to the seizure, the evidence does not indicate that the agents abused their power in seizing the aircraft, certainly not to the extent that a trier of fact could reasonably determine their conduct to be extreme and outrageous.

Furthermore, plaintiffs identify no evidence indicating that the agents intended the seizure to cause the Gashos emotional distress or that they should have recognized a high risk of severe emotional distress resulting from the seizure. In fact, the evidence indicates the Customs Service determined to seize the aircraft prior to any personal encounter with the Gashos and solely because of the change of registration markings. Plaintiffs' Statement of Facts ¶ 18.

3. False arrest

Defendant also contends that plaintiffs' intentional infliction claim based on the arrest does not state a separate basis for recovery but merely repeats the claim for false arrest. Defendant asserts that plaintiffs could recover for emotional distress only if they prevailed on the claim for false arrest.

Although defendant cites no authority for this contention, the Restatement (Second) of Torts § 47 provides that recovery for emotional distress is limited to instances in which an actor intends to invade the interest in freedom from emotional distress and is not available if the actor intends only to invade some other interest, such as the interest in freedom from confinement. Restatement (Sec-

ond) of Torts § 47 comment a.[7] Similarly, where the act is only tortious because it involves the risk of invading another interest "the tortious quality of the act is insufficient to create liability for emotional distress alone." *Id.* Damages for emotional distress may be obtained only as a "'parasitic'" element of the damages assessed for invasion of the other protected interest. Restatement (Second) of Torts § 47 comment b. Thus, because plaintiffs' claim for false arrest will be dismissed, plaintiffs cannot recover for emotional distress even if they could show that the agents' conduct in arresting plaintiffs otherwise formed a basis for an intentional infliction claim.

4. Threats of prosecution

Paragraph 54 of the complaint also alleges that plaintiffs suffered emotional distress as the result of "continuing threats of criminal prosecution" following their arrest. The only evidence plaintiffs offer in the response to support this allegation is Agent Mannhalter's testimony that he was instructed by Resident Agent in Charge Howe to inform the Gashos upon their release that the Customs Service would pursue criminal prosecution against them. Agent Mannhalter testified he was not certain he actually did tell the Gashos they would be prosecuted and plaintiffs cite no evidence indicating that he did tell them. No evidence even suggests that Agent Mannhalter abused his position of authority by threatening prosecution at this time. Nor does plaintiff cite any evidence indicating that if prosecution were threatened at this time, the threat was intended to cause or delivered despite a high risk that it would cause the Gashos severe emotional distress. The parties do not dis-

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[7] One of the illustrations for this section is particularly apt:

> A attempts to arrest B under an invalid warrant. B succeeds in avoiding arrest by running away. B is affronted, humiliated and angry, broods over the matter, and suffers severe emotional distress. A is not liable to B.

Restatement (Second) of Torts § 47 comment a, illustration 1.

pute that in fact the Customs Service did subsequently refer the matter to the United States Attorney for criminal prosecution.

Furthermore, as defendants argue, plaintiffs have identified no evidence that the Gashos were "threatened" with criminal prosecution. The only "threat" of prosecution John Gasho could identify in his deposition was his knowledge of the possibility of prosecution gained through the Gashos' own attorneys' investigations and communications with the government. These "threats" included a letter his attorney received from the United States Attorney referring to a criminal syllabus on the Gashos, the government's refusal for some period to return the airplane and logbooks, the governments' request of the Gashos' attorney that they stipulate to use of copies of the logbooks in any subsequent criminal litigation if the originals were released, and Gasho's feeling that he would not be free of the "harassment or fear of being prosecuted" until the government informed him he would not be prosecuted. J. Gasho Deposition at 219-26, Reply, Exhibit C.

Plaintiffs identify no instances in which the government communicated to the Gashos, directly or through their counsel, any threat of prosecution beyond merely responding to requests for information. Certainly, nothing in the evidence would form the basis for a reasonable jury to find the Customs agents had abused their power to a degree that would support a finding of extreme and outrageous conduct, nor do plaintiffs identify any evidence which suggests the government responded to the Gashos' attorney's inquiries with the intent or at reasonable risk of causing the Gashos severe emotional distress. Thus, plaintiffs' allegations of threats of prosecution also do not provide a basis for their intentional infliction claim.

C. *Count III: Abuse of Process*

In count three, the Gashos and Millardair assert a claim for abuse of process on the ground that defendant's agents wrongfully refused to release the aircraft after the United

States Attorney decided not to institute forfeiture proceedings. Plaintiffs allege defendant's agents continued to detain the aircraft in order to force plaintiffs to absolve the Customs Service from any civil liability arising from seizure of the airplane and arrest of the Gashos. Defendant seeks dismissal of this claim on the ground that it falls within the exception to FTCA liability for actions "arising in respect of" a customs detention. 28 U.S.C. § 2680(c). Plaintiff responds that the essence of the abuse of process claim is not the actual detention of the aircraft but rather the improper motivation for the detention which perverted otherwise proper forfeiture proceedings.

Neither party addresses the question whether section 2680(c) applies to claims for intentional torts arising out of the customs detention as well as to such claims based on negligence. The authorities defendant cites in arguing for broad application of the exception concern damages to detained property from negligent handling or storage, or damages arising from loss of, or loss of the use of, the detained goods. *See Kosak v. United States*, 465 U.S. 848, 854, 104 S. Ct. 1519, 1523-24, 79 L.Ed.2d 860 (1984) (damage to detained property while in storage); *Solus Ocean Systems, Inc. v. United States Customs Service*, 777 F.2d 326, 328 (5th Cir.) (detained property sold without notice to owners); *United States v. $149,345 United Sates Currency*, 747 F.2d 1278, 1283 (1984) (loss of use of money while in detention).

As the court has previously noted, as a matter of statutory construction, any exception for intentional torts must be found in section 2680(h) and not in the other exceptions enumerated in section 2680, which apply only to claims in negligence. *Vu v. Meese*, 755 F. Supp. at 1385-86; *see* section B(2). Furthermore, although abuse of process is one of the intentional torts excepted from the FTCA by section 2680(h), that exception does not apply when such claims are asserted against officers of the United States who are "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C.

§ 2680(h). Defendant's agents clearly fall within this definition. Thus, plaintiffs' abuse of process claim is not excepted from the FTCA by either section 2680(c) or 2680(h). Defendant's motion for summary judgment as to count three will therefore be denied.[8]

D. *Count Five: Breach of Contract*

In count five, Millardair seeks to recover for damage to the aircraft while in the custody of the Customs Service. Plaintiffs allege that defendant breached a duty to "preserve and care for" the aircraft arising from an implied-in-fact contract of bailment with Millardair. Defendant moves for summary judgment dismissing this claim on the ground that plaintiffs have alleged no facts upon which an implied-in-fact contract could be based. In their response, plaintiffs contend that an implied-in-fact contract was created by defendant's agents, the Customs Pilots, when they complied with Sharon Gasho's request that they protect the aircraft's propellers in applying locks to effect the seizure.

The United States may be sued under the Tucker Act for breach of an implied-in-fact contract arising from the detention of goods by customs officers. *Hatzlachh Supply Co., Inc. v. United States*, 444 U.S. 460, 462-63, 100 S. Ct. 647, 649, 62 L.Ed.2d 614 (1980). In order to establish the existence of an implied-in-fact contract, a plaintiff must establish " 'mutuality of intent to contract, offer and acceptance, and that the officer whose conduct is relied upon had

---

[8] Neither party addresses the question of whether mere detention in the absence of a forfeiture proceeding is "process" that is subject to an abuse of process claim. One district court, assuming that detention is not "process," denied an abuse of process claim arising out of Customs agents' refusal to release detained property. The court stated that an abuse of process claim requires that a court proceeding has been filed and the process of the court subsequently used for an improper purpose. *Blue Dolphin, Inc. v. U.S.*, 666 F. Supp. 1538, 1541 (S.D. Fla. 1987). This question has not been raised or briefed by the parties, however, and the court therefore does not consider the issue to be before it at this time.

actual authority to bind the government in contract.'" *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988). The complaint in this case fails to allege any facts, including any implied promise by a government official, that might establish the formation of an implied-in-fact contract of bailment. Furthermore, the factual basis plaintiffs allege in their response cannot, as a matter of law, establish an implied-in-fact contract.

Plaintiffs contend that by taking measures to protect the aircraft's propellers, Customs Pilots Willbanks and Steck impliedly promised to continue taking measures to preserve the aircraft while in detention. As defendants argue, however, the pilots only acted to protect the propellers at the request of Sharon Gasho who expressed concern that the locks would damage the propellers. Furthermore, even if the pilot's acts could be interpreted as some kind of affirmative promise to continue to protect the aircraft, the pilots were not authorized to bind the government by any such promise. As defendant argues, the United States can only be bound by "contracting officers," and neither Willbanks nor Steck held such authority. *See* 48 C.F.R. § 1.601; Affidavit of Theodore Kasna, Reply, Exhibit D. Thus, plaintiffs fail to identify any implied promise or statement by an authorized agent of the government that might establish an implied-in-fact contract with the federal government.[9] Defendant's motion as to count four will therefore be granted.

IT IS ORDERED granting defendant's motion for summary judgment (Doc. No. 48) dismissing counts one, two

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[9] The court need not determine the validity of any other aspect of plaintiffs' questionable interpretation of the facts alleged. The court notes, however, that to accept plaintiffs' interpretation, a trier of fact would have to reach the unlikely conclusion that Sharon Gasho intended her request that the propellers be protected as an offer to transfer possession of the aircraft under a contract of bailment. In addition, plaintiffs do not even suggest any form of consideration that might have passed in these circumstances.

and five of the complaint, but denying the motion as it pertains to count three.

DATED this 24th day of July, 1991.

/s/ ROBERT C. BROOMFIELD
Robert C. Broomfield
United States District Court

Copies to all parties of record

APPENDIX "G"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN R. GASHO, SR.; SHARON L. GASHO Plaintiffs-Appellants, v. UNITED STATES OF AMERICA; NORTHROP WORLDWIDE AIRCRAFT SERVICES, INC., an Oklahoma corporation, et al., Defendants-Appellees.	No. 92-16988 D.C. No. CV-89-02077-RCB
JOHN R. GASHO, SR.; SHARON L. GASHO MILLARDAIR LTD., a Canadian corporation, Plaintiffs-Appellants, v. WILLIAM L. BALL; ROGER MANNHALTER; JOHN J. HOWE, JR. Defendants-Appellees.	No. 93-15727 D.C. No. CV-92-01211-RCB ORDER

(Filed December 27, 1994)

Before: D.W. NELSON, BOOCHEVER AND BEEZER, Circuit Judges

After due consideration, appellee's petition for rehearing is DENIED.

APPENDIX "H"

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 92-16988
CT/AG#: CV-89-02077-RCB

JOHN R. GASHO, SR.; SHARON L. GASHO,
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA; NORTHROP WORLD-WIDE AIRCRAFT SERVICES, INC., an Oklahoma corporation, et al.
Defendants-Appellees

NO. 93-15727
CT/AG#: CV-92-01211-RCB

JOHN R. GASHO, SR.; SHARON L. GASHO; MILLARDAIR, LTD., a Canadian corporation
Plaintiffs-Appellants

v.

WILLIAM L. BALL; ROGER MANNHALTER; JOHN J. HOWE, JR.
Defendants-Appellees.

(Filed January 11, 1995)

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED in part, AFFIRMED in part and REMANDED. Filed and entered November 2, 1994. Costs taxed.

APPENDIX "I"

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA CIVIL MINUTES — GENERAL

(Filed February 27, 1995)

Phoenix Division

CIV 2/92 / 1211 / RCB (Year / Case No / Initials) DATE: Monday, February 27, 1995

Title: Gasho etal vs. USA

vs.

Plaintiff / Defendant

HON: Robert C. Broomfield Judge #7018/RCB

B. Lundberg, Deputy Clerk

R. Huckaby-Cotton, Court ECR

Attorney(s) for Plaintiffs(s)

by telephone: Maria Speth

Attorney(s) for Defendant(s)

Timothy Garren/Arthur Garcia

PROCEEDINGS: xx Open Court ____ Chambers ____ Other

scheduling conference
status hearing Re 9th Circuit Mandate

scheduling conference/status hearing held

Doc 94 — Pltfs motion to consolidate w/92-1211 is GRANTED for discovery purposes only

The court will hold 2 separate trials — Bevins claim to a jury(Civ 92-1211)

FTCA claims to the court (Civ 89-2077)
trial date to be set at the final pretrial conference

Discovery cut off 5/26/95 — no further discovery in 89-2077

A consolidate Pretrial order to be filed by 6/5/95

Final Pretrial Conference 3:45, Monday, June 12, 1995

Pltfs cnsl advised to file a notice of substitution of counsel and to have previous counsels names removed from the courts mailing list

The above information to be docketed in CIV 92-1211

/ / Notice to Counsel

APPENDIX "J"

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE STATE OF ARIZONA

JOHN R. GASHO, SR. and SHARON L. GASHO, husband and wife, MILLARDAIR, LTD., a Canadian corporation, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	No. CIV 89-2077 PHX RCB
JOHN R. GASHO, SR. and SHARON L. GASHO, husband and wife, MILLARDAIR, LTD., a Canadian corporation, Plaintiffs, vs. WILLIAM BALL, ROGER MANNHALTER, JOHN J. HOWE, JR. Defendants.	No. CIV 92-1211 PHX RCB **MOTION FOR PROTECTIVE ORDER PREVENTING DISCOVERY ON ISSUE OF QUALIFIED IMMUNITY**

(Filed March 30, 1995)

Plaintiffs, through their undersigned counsel and pursuant to Rule 26(C), Federal Rules of Civil Procedure, move for a protective order preventing Defendants from taking any discovery on the issue of whether Defendants William Ball, Roger Mannhalter, and John J. Howe, Jr. are protected by qualified immunity. This Motion is supported by the accompanying Memorandum of Points and Authorities, the attached Certification of Moving Counsel and the record in this matter.

RESPECTFULLY SUBMITTED this 30th day of March , 1995.

BEUS, GILBERT & MORRILL, P.L.L.C.

By /s/ MARIA C. SPETH

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MEMORANDUM OF POINTS AND AUTHORITIES

I. *INTRODUCTION AND BACKGROUND.*

This case involves claims by Plaintiffs against the United States government under the Federal Tort Claims Act ("FTCA") seeking damages for false arrest and false imprisonment, intentional infliction of emotional distress, and abuse of process as well as claims against certain U.S. Customs Agents[1] for constitutional violations ("the *Bivens* claim").

This Court granted summary judgment to Defendants on (1) the false arrest and imprisonment claims and (2) the

[1] The Customs Agents are William Ball, Roger Mannhalter, and John J. Howe, Jr.

intentional infliction of emotional distress claim. This Court also dismissed Plaintiffs' abuse of process claims. The Court then dismissed the Plaintiffs' *Bivens* claim, finding that such claim was barred by 28 U.S.C. § 2676.[2]

On appeal, the Ninth Circuit reversed this Court's dismissal of Plaintiffs' FTCA claims and the dismissal of the *Bivens* claim.

The Ninth Circuit found that the Customs Agents had no probable cause to arrest Plaintiffs under these statutory provisions. The Ninth Circuit found that Plaintiffs' *Bivens* claim was not barred because there was no longer a judgment barring it pursuant to 28 U.S.C. § 2676. Further, the Ninth Circuit ruled that as a matter of law the Customs Agents were not protected by qualified immunity.

Plaintiffs' case has now been remanded back to this court for further proceedings.

II. *THE NINTH CIRCUIT HAS DECIDED DEFENDANTS' CLAIM OF QUALIFIED IMMUNITY AND THUS, NO DISCOVERY SHOULD BE ALLOWED REGARDING THIS ISSUE.*

On appeal, Defendant Customs Agents raised the argument that they were entitled to the defense of qualified immunity from any damages caused by Plaintiffs' arrest. The Ninth Circuit specifically concluded, as a matter of law, that the Customs Agents were not entitled to the defense of qualified immunity. Despite that ruling, Defendants now seek to resurrect the issue of qualified immunity.

The Ninth Circuit applied the following two-part test:

> (1) First, a plaintiff must show that a constitutional right was clearly established; and

---

[2] 28 U.S.C. § 2676 provides that the "judgment" in a FTCA action bars any action by the claimant, by reason of the same subject matter, against the government employee whose act gave rise to the claim.

> (2) if plaintiff shows a clearly-established constitutional right, the burden shifts to the defendant to show that a reasonable police officer could have believed, in light of existing law, that he did not violate a constitutional or statutory right.

39 F.3d 1420, 1439 (1994).

The Ninth Circuit held that "the Fourth Amendment right to be free from arrests without probable cause is clearly established." *Id.* The court stated:

> Probable cause is obviously lacking when the arrest is motivated purely by a desire to retaliate against a person who verbally challenges the authority to effect a seizure or arrest.

Id.

The Court then held that "the defendants have failed to demonstrate that a reasonable officer could have believed, as a matter of law, that the Gashos' arrests were lawful." *Id.*

The Ninth Circuit also held a reasonable officer, in light of clearly established law, would have known that the Gashos' passive refusal to turn over the log books was privileged conduct which could not serve as a basis for finding criminal intent, stating unequivocally, "The agents are not entitled to qualified immunity." *Id.*

Recently, even *Defendants* admitted that the Ninth Circuit decided the issue of qualified immunity as a matter of law because the Ninth Circuit reached the conclusion that no reasonable officer could have found probable cause for the arrest of Plaintiffs. *See* p.3, *Application For an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit,* dated March 1995, attached hereto.

The Ninth Circuit has clearly determined this issue and Defendants should be denied any request for discovery.

III. *CONCLUSION.*

Because the Ninth Circuit has determined that Defendants were not entitled to the defense of qualified immunity as a matter of law, this Court should grant Plaintiffs' protective order regarding discovery on the issue of qualified immunity.

RESPECTFULLY SUBMITTED this 30th day of March, 1995.

BEUS, GILBERT & MORRILL, P.L.L.C.

By /s/ MARIA C. SPETH

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[EXHIBITS DELETED]

APPENDIX "K"

Deposition of William Ball, November 7, 1990, United States District Court, District of Arizona, CIV-89-2077-PHX-RGM.

At deposition, Agent William Ball testified as follows:

Q. When did you first request that they give you the logbooks?
A. Right after we went into — No. We were still on the field, as I recall, when we first asked for the logbooks back.
Q. How did they respond?
A. Denied having them.

Deposition of Roger Mannhalter, March 26, 1991, United States District Court, District of Arizona, CIV-89-2077-PHX-RGM

Agent Mannhalter testified as follows:

Q. So he asked if she had the logbooks, in front of you. She said 'Yes.' Correct?
A. That's correct.
Q. She proceeded to the car; correct?
A. That's correct.

* * *

Q. And then what did she do?
A. Came back over there where we were standing.
Q. All right. Did you attempt to stop her from taking the logbooks at that time?
A. At that time there I told them they had to return the logbooks.
Q. At that very minute?
A. Yes, I believe it was.
Q. You believe that at that very minute when he yelled at her and she said 'Yes, I have them,' you told her 'Give those logbooks back?'
A. Oh, I don't know if it was right at that minute there or it was when she came back to the —

Q. Right. As a matter of fact —
A. In fact, it might have been even before she got back I told them that they had to —

Deposition of John R. Gasho, Sr., November 8, 1990, United States District Court, District of Arizona, CIV-89-2077-PHX-GRM.

At deposition, John Gasho testified as follows:

Q. Now, as I understand it, Mr. Ball and Mr. Mannhalter apparently overheard you ask Sharon if she got the logbooks.
A. That may be.
Q. Was it your understanding that they did overhear you?
A. I can only assume that they may have.

* * *

Q. Why do you assume that they overheard you?
A. Because that was about the time they started asking for them.

* * *

Q. I said, as a matter of fact, shortly after you addressed your comments to Sharon as to whether she got the logbooks, they, that is the Agents, indicated to you that you would have to return the logbooks or you would be arrested, isn't that correct?
A. It was in a short time period there.

APPENDIX "L"

Deposition of John R. Gasho, Sr., November 8, 1990, United States District Court, District of Arizona, CIV-89-2077-PHX-GRM.

At deposition, John Gasho testified as follows:

Q. He indicated that he felt the logbooks were in the car, is that right?
A. That's — yeah.
Q. At that point in time, you felt the logbooks were in the car, as well, is that not correct?
A. It's a possibility.
Q. Well, you believed it at the time, didn't you?
A. Well, I kind of felt they may have been there.
Q. And your daughter at that point denied that the logbooks were in her car, did she not?

* * *

A. She may have. Possibly.

* * *

Q. You didn't correct her in front of the agents and say that the logbooks were in the car, did you?
A. No, I didn't.

Deposition of Sharon Gasho, March 25, 1991, United States District Court, District of Arizona, CIV-89-2077-PHX-GRM.

At deposition, Sharon Gasho testified as follows:

Q. You're saying they merely asked you if you had the logbooks, is that correct?
A. Well, it didn't exactly — you know, subsequent to that, it was because John asked me if I had the logbooks that they said — then they just came unglued, completely hysterical, and said 'Oh, you have the logbooks. We have to have those back.' It wasn't really a question. It was a demanding statement before they even really knew whether or not I had them. And at that point, I wasn't sure whether or not I had them. I said, 'I think I do. I don't know.'

Supreme Court, U.S.
FILED
MAY 30 1995
CLERK

(2)

No. 94-1777

In the Supreme Court of the United States October Term, 1994

WILLIAM L. BALL; ROGER MANNHALTER; JOHN J. HOWE, JR.,
Petitioners,

v.

JOHN R. GASHO, SR.; SHARON L. GASHO,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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31pp

QUESTIONS PRESENTED

Consistent with this Court's decisions in *Harlow v. Fitzgerald*, 475 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), the Ninth Circuit determined that the Customs Agents were not entitled to qualified immunity because, based on clearly established law, no reasonable Customs agent could have believed that there was probable cause to arrest John and Sharon Gasho. Thus, this case presents the following questions:

1. Whether Petitioners' argument that the Ninth Circuit did not apply an objective standard of reasonableness to determine the qualified immunity issue is frivolous.

2. Whether Petitioners' argument that the Ninth Circuit did not apply clearly established principles of constitutional law to defeat Petitioners' qualified immunity defense is frivolous.

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No. 94-1777

In the Supreme Court of the United States October Term, 1994

WILLIAM L. BALL; ROGER MANNHALTER; JOHN J. HOWE, JR.,

Petitioners,

v.

JOHN R. GASHO, SR.; SHARON L. GASHO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents John R. Gasho, Sr. and Sharon L. Gasho respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners William L. Ball, Roger Mannhalter, and John J. Howe, Jr.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioners, Respondents refer this Court to the statutory provisions cited below.

Title 18, Section 2233, of the United States Code provides:

> Rescue of seized property.
>
> Whoever forcibly rescues, dispossesses, or attempts to rescue or dispossess any property, articles, or objects after the same shall have been taken, detained, or seized by any officer or other person under the authority of any revenue law of the United States, or by any person authorized to make searches and seizures, shall be fined under this title or imprisoned not more than two years, or both.

Title 28, Section 2676, of the United States Code provides:

> Judgment as bar.
>
> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

STATEMENT OF THE CASE

A. Factual Statement.

John and Sharon Gasho own an aircraft restoration company in Tucson, Arizona. On June 24, 1988, the Gashos flew a McDonnell Douglas DC-3 aircraft from Tucson to the Scottsdale Municipal Airport in order to meet with John Zarcone, a Federal Aviation Administration (FAA) inspector.[1] The Gashos were selling the aircraft to Millardair, Ltd., a Canadian corporation, and needed to terminate the United States registration of the aircraft before export.

At the airport, Zarcone issued the Gashos several documents, including a Special Flight Authorization allowing the aircraft to be flown to the United States-Canada border with Canadian registry markings. The Special Flight Authorization stated that Canada would not issue a valid Canadian registration until the aircraft actually entered into Canada. Millardair had applied to Canadian authorities for a Canadian registration and had been assigned a Canadian number; however, official registration was contingent upon the aircraft's entry into Canada.

The Gashos with the assistance of Zarcone removed the U.S. registration markings and affixed the Canadian

---

[1] There is absolutely no evidence that John and Sharon Gasho have ever participated in smuggling contraband across the United States-Mexico border. In fact, the Customs Service concluded after their investigation of the Gashos that they are honest, law abiding citizens who are "as clean as a whistle."

markings to the aircraft. The Gashos then returned to their room at a nearby hotel in Scottsdale, Arizona. It was the Gashos' intention to return to Tucson the following day to await issuance of a provisional certificate of registration and flight permit before exporting the aircraft to Canada.

Later that day, an air traffic controller at the airport noticed that the registration markings on the aircraft had been changed after its arrival. He alerted William Gately, the Customs agent in charge. Based solely on the report of the air traffic controller and without any further investigation, Gately, Special Agent William Ball and others decided that "the aircraft would not be permitted to depart, and should be seized because of registration irregularities."[2] Gately dispatched Special Agents Ball and Roger Mannhalter to investigate.

---

[2] Gately claims that he telephoned a friend, Corporal Karol Waversfeld of the Royal Canadian Mounted Police in Vancouver. Gately claims Waversfeld told him the registration markings were invalid prior to seizure of the aircraft. Waversfeld gave a different account in a deposition. He testified that Lorraine Gray of the Canadian Transport Ministry in Toronto told him that an application for Canadian registry was pending and that the numbers could not be used in Canada until the application was approved. Waversfeld testified that he relayed this information to Gately or his representative. There is also a dispute regarding when the information was relayed to Gately. Petitioners claim that Gately knew the information before the seizure of the aircraft. Waversfeld, however, testified that he could not have called Gray on the afternoon of June 24, 1988, because there is a four hour time difference between Vancouver and Toronto and therefore Gray would not have been at her office when Waversfeld received the call from Gately in the afternoon of June 24, 1988.

The Customs Agents learned from officials at the Scottsdale Airport that the Gashos were staying at a local hotel. The Customs Agents easily located the Gashos at the hotel. When the Agents confronted the Gashos at their hotel room, John Gasho explained the ownership history of the aircraft, that he obtained the Canadian registry markings from the aircraft's owner, Millardair, and that the FAA inspector John Zarcone had assisted in changing the registration markings. He explained that the FAA issued several documents, including a special authorization permit, which was inside the aircraft, allowing the aircraft to be flown to Canada. After hearing John Gasho's explanation, Customs Service Pilot Will Willbanks, who was also present at the hotel, informed Agents Ball and Mannhalter that the procedure described by John Gasho for changing registration markings before export was consistent with the customary FAA procedures for exporting an aircraft to Canada. Nevertheless, Agent Ball advised John Gasho of his *Miranda* rights. The Gashos then summoned their daughter, Pamela Vining, a Phoenix attorney, for legal counsel.

At this point, the Agents, the Gashos and Vining went to Scottsdale airfield. At the airport, the Gashos showed the Customs Agents the documents issued by the FAA, including the Special Flight Authorization allowing them to fly the aircraft with Canadian markings. The Special Flight Authorization signed by Zarcone expressly provided that the aircraft could display the foreign (Canadian) registration markings for the purpose of flying the plane to the Canadian border and that "the aircraft . . . had a current and valid standard airworthiness certificate . . . but will not be issued a current

and valid Canadian airworthiness certificate until after its entry into Canada."

While the documentation expressly provided that the aircraft was authorized by the FAA to fly with the Canadian markings within the United States, the Agents decided that the documents did not establish the *validity* of the Canadian markings. The Agents placed a lock on the aircraft's propeller, claiming they had probable cause to seize the aircraft for the "knowing[ ] and willful[ ]" display of "false or misleading" markings, in violation of 49 U.S.C. § 1472.

After seizing the aircraft, the Customs Agents gave Sharon Gasho permission to enter the aircraft to remove personal belongings and the aircraft's radio. The Customs Agents did not tell her that any items inside the aircraft were seized. Among the items she removed were the aircraft's logbooks. Sharon Gasho then exited the aircraft, carrying the items in a plastic bag. At that time, John Gasho and the Customs Agents were standing on the tarmac near the aircraft. In the presence of the Customs Agents, John Gasho called out to his wife in a loud, clear voice and asked her whether she removed the logbooks. She replied, "Yes, I did." Sharon Gasho then placed the plastic grocery bag containing the logbooks and other personal belongings into Vining's automobile. Neither Agent Ball nor Agent Mannhalter made any effort, either physical or verbal, to stop Sharon Gasho from removing the logbooks and placing them in the vehicle. In a deposition, Agent Ball was cross-examined as follows:

Q. Did you stop her at that time?

A. No.

Q. Did you say anything to her at that time?

A. No.

Q. Did you protest in any way?

A. No.

Q. All right. What happened next?

A. Shortly thereafter we went inside the aviation center.

The subject of the logbooks was not raised until after the parties entered the Scottsdale Aviation Center to make photocopies of the FAA documents. Ball and the other Agents then told the Gashos that the seizure of the aircraft included the logbooks and demanded that the Gashos return them.[3] When Agent Ball threatened to search the vehicle, the Gashos called the local police to prevent a breach of the peace. The Agents warned the Gashos that they would be arrested if they refused to turn over the logbooks.

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[3]Customs Service Pilot Willbanks, who was present during the entire play of events at the Scottsdale Airport on June 24, 1988, told Agent Mannhalter, prior to the handcuffing of the Gashos, that the logbooks were not a "big issue." In fact, according to Customs Service policy, normally logbooks are never seized with an aircraft and are not necessary to the operation of an aircraft. Willbanks testified that the logbooks are only important when the aircraft is put in service. However, when the Customs Service seizes an aircraft, the logbooks are not important because the aircraft is not put in service, but, rather, is put in a storage facility pending forfeiture proceedings.

At Vining's request, the Agents allowed Vining to meet with the Gashos in a glass-enclosed office at the avaiation center, where the Gashos were visible to the Customs Agents. Immediately prior to the Gashos' conference with Vining, Agent Ball telephoned his supervisor John Howe to advise him of the situation. Mr. Howe ordered Agent Ball to arrest the Gashos for theft from Customs' custody and told Ball that if he did not effect the arrest, he (Howe) would come down and do it himself.

During the conference with Vining, the Gashos reached the decision to give the logbooks to the Customs Agents. Just as Vining was opening the office door to inform the Agents of this decision, the Agents pushed open the door and handcuffed the Gashos. Vining retrieved the logbooks from her car and gave them to the Customs Agents. Although the Gashos acquiesced in relinquishing the logbooks, the Customs Agents handcuffed John and Sharon Gasho, unnecessarily paraded them through the lobby of the aviation center, and loaded them into a squad car which transported them to the Madison Street jail.

The Gashos were booked for violation of 18 U.S.C. § 549, which forbids unlawful removal of property from Customs custody. During booking, an Assistant United States Attorney told Agent Mannhalter that his office would not prosecute the Gashos. Nevertheless, Agent Mannhalter's supervisor, John Howe, ordered Mannhalter to continue the booking process and to tell the Gashos that charges would be filed. In October 1989, sixteen months after the arrests, the United States Attorney formally declined to prosecute the Gashos.

B. District Court Proceedings.

The Gashos filed suit against the United States under the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680, seeking damages for false arrest and false imprisonment, intentional infliction of emotional distress, and abuse of process.[4] The district court granted summary judgment in favor of the government on the false arrest and imprisonment claims and the intentional infliction of emotional distress claim. By subsequent order, the district court dismissed the abuse of process claim for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Prior to entry of judgment on the FTCA claims, the Gashos filed suit under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), against Agents Ball and Mannhalter, and Howe, the Agents' supervisor. The Gashos claimed that the Agents arrested them without probable cause, violating their Fourth and Fifth Amendment rights.

The defendants moved to dismiss the *Bivens* claims pursuant to Fed.R.Civ.P. 12(b)(6) and also moved for summary judgment, arguing that because of the judgment entered in the FTCA action, 28 U.S.C. § 2676 operates as a complete bar to the *Bivens* action and, alternatively, that the defendants were entitled to qualified immunity. The

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[4]The Gashos also filed a claim against Northrop Worldwide Aircraft Services, Inc. ("Northrop") for damage incurred to the aircraft while in Customs' custody. The Gashos settled the claim with Northrop.

district court dismissed the claims, concluding that they were barred by 28 U.S.C. § 2676.

C. Ninth Circuit Decision.

The Ninth Circuit consolidated the appeals in the FTCA action and the *Bivens* action. In addressing the false arrest claims in the FTCA action, the Ninth Circuit held that there was no probable cause for the arrests of the Gashos under 18 U.S.C. §§ 2232 or 2233 because no agent could have reasonably believed that the Gashos intended to steal the logbooks from Customs' custody or that the Gashos intended to prevent seizure of the logbooks.[5] *Gasho v. United States*, 39 F.3d 1420, 1427-1432 (9th Cir. 1994) (Petitioners' Brief at pp. 7a-18a). The Ninth Circuit reasoned that no probable cause existed because the Agents gave the Gashos no notice that they intended to seize the logbooks and there was no evidence that the Gashos knew the removal of the logbooks was forbidden. *Id.* The Ninth Circuit further determined that the Gashos' mere passive refusal to consent to a warrantless search did not provide probable cause to arrest the Gashos under §§ 2232 or 2233. *Id.*

With respect to the *Bivens* claims, the Ninth Circuit held that since the judgment was reversed on the false arrest claims in the FTCA action, the *Bivens* claims based on the Gashos' wrongful arrests were not barred by operation of 28 U.S.C. § 2676. *Id.* at 1437-38 (Petitioners' Brief at pp. 29a-

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[5] Although the Gashos were arrested under 18 U.S.C. § 549, the United States conceded that no probable cause for the arrests existed under § 549.

30a). Thus, the Ninth Circuit concluded that Respondents could pursue both their FTCA and *Bivens* claims on remand. *Id.*

After finding that the *Bivens* claims for wrongful arrest were not barred, the Ninth Circuit analyzed the Agents' qualified immunity claim and found that based on clearly established principles of constitutional law, no reasonable agent could have believed that the Gashos' arrests were lawful. *Id.* at 1438-39 (Petitioners' Brief at pp. 31a-32a). The Ninth Circuit employed a two-step analysis. First, the plaintiff must show that a clearly establish constitutional right exists. Second, the defendant must show that based on well settled law, he could have believed he was not violating that constitutional right. *Id.*

Under the first step of the analysis, the Ninth Circuit found that the Gashos had a clearly established constitutional right to refuse consent to a warrantless seizure. *Id.* The Ninth Circuit then found that based on an objective review of the information known to the Agents at the time of the arrests, not on their subjective motives for the arrests, no reasonable agent could have believed that the arrests were lawful. *Id.* The Ninth Circuit determined that the officers should have known the arrests were unlawful because there was no evidence the Gashos had the specific intent to prevent Customs' seizure of the logbooks or to steal them from Customs' custody. *Id.* The Agents had no facts to support a belief that the Gashos knew that the logbooks were an appurtenance to the aircraft and they should have known, in light of the clearly established law, that the Gashos' passive refusal to turn over the logbooks was privileged conduct

which could not serve as a basis for finding criminal intent. *Id.*

REASONS FOR DENYING THE WRIT

The questions of qualified immunity on which review is sought involve no conflict with any decision of the Court. Petitioners' arguments to the contrary are frivolous and imposed solely for the purpose of delaying any action on the *Bivens* claims on remand to the district court. The decision below properly applied the rulings of this Court on qualified immunity. Consistent with *Harlow v. Fitzgerald*, 475 U.S. 800 (1982), the Ninth Circuit held that no reasonable officer could have believed the arrests of the Gashos were lawful. The Ninth Circuit's decision is also consistent with this Court's ruling in *Anderson v. Creighton*, 483 U.S. 635 (1987).

I. PETITIONERS' ARGUMENT THAT THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH RULINGS OF THIS COURT IS FRIVOLOUS.

A. The Ninth Circuit Properly Applied an Objective Standard to Determine the Qualified Immunity Issue.

Petitioners contend that the Ninth Circuit improperly applied a subjective test to determine the issue of qualified immunity. In making the argument, Petitioners completely ignore the analysis of the Ninth Circuit on the qualified immunity issue. Not only did the Ninth Circuit not apply a subjective test, the court thoroughly analyzed the reasonable-

ness of the Agents' conduct objectively in light of clearly established law.[6]

In its decision, the Ninth Circuit pointed out that the Gashos presented evidence that Agent Howe told another Customs official that the Gashos were arrested because their refusal to turn over the logbooks "made [the Agents] mad." *Gasho*, 39 F.3d at 1438 (Petitioners' Brief at p. 31a). Petitioners point to this single sentence in the Ninth Circuit's opinion to support their argument that the Ninth Circuit applied a subjective test. Petitioners have taken this sentence out of context and ignore the remainder of the Ninth Circuit's opinion wherein the court thoroughly analyzed the Agents' conduct in accordance with an objective standard.

Respondents argued before the Ninth Circuit that they were arrested in retaliation for refusing to turn over the logbooks. *Id.* As evidence of the Agents' retaliation, the Gashos cited to Agent Howe's comment that the Gashos "made [the Agents] mad." *Id.* The Ninth Circuit referred to Howe's comment to explain the Gashos' argument that they were arrested solely for refusing consent to a

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[6] Petitioners erroneously argue that an officer's subjective intent is irrelevant to determining whether the officer is entitled to qualified immunity. In fact, in *Harlow*, this Court did not hold that an officer's intent is irrelevant, but rather the Court held that allegations of an officer's malice is not sufficient to subject that officer to liability unless it is shown that the officer knew or should have known that his conduct violated clearly established law. *Harlow*, 475 U.S. at 817-818. This point, however, is irrelevant because the Ninth Circuit in this case applied an objective test to determine that the agents could not have believed that the arrests of the Gashos were lawful in light of clearly established law.

warrantless search and refusing to turn over the logbooks. The Ninth Circuit did not rely on Howe's comment or the Agents' subjective retaliatory motives in concluding that the Agents were not entitled to the qualified immunity defense.

In analyzing the qualified immunity defense, the Ninth Circuit examined the facts known to the Agents at the time of the Gashos' arrests, not their subjective motives. The Ninth Circuit found that no reasonable Customs agent could have believed the arrests were lawful because there was no evidence that the Gashos had the specific intent to steal the logbooks from Customs' custody or to frustrate or prevent their seizure. *Id.* at 1438-1439. (Petitioner's Brief at pp. 31a-32a). The Agents allowed Sharon Gasho to enter the aircraft specifically for the purpose of removing objects from inside. The Agents never gave her notice that she could not take the logbooks or that the logbooks had been seized. The Ninth Circuit determined that absent such warning, the Agents had no reason to believe that the Gashos knew the logbooks were an appurtenance to the aircraft, that the logbooks had been seized or that their removal was forbidden. Further, the Ninth Circuit determined that the Gashos' mere passive refusal to consent to a warrantless search and immediately turn over the logbooks was not grounds for finding criminal intent.

The Ninth Circuit's analysis is based solely on what the Agents knew and observed prior to and at the time of the arrests and what a reasonable agent should have done under the circumstances. Nothing in their analysis suggests that the Ninth Circuit reached its conclusion that the Agents were not

entitled to a qualified immunity defense because it believed the Agents were angry with the Gashos.

B. The Ninth Circuit Clearly and Expressly Articulated the Specific Constitutional Right at Issue and Properly Held that Based on Clearly Established Law the Officers Were Not Entitled to Qualified Immunity.

There is no question that the Ninth Circuit's finding that the Agents were not entitled to qualified immunity was a decision well grounded in this Court's rulings. The Ninth Circuit recognized that Respondents had a duty to show that the constitutional right at issue was clearly established.[7] Contrary to the Petitioner's assertion, the Ninth Circuit analyzed the specific principles of constitutional rights at issue in holding that the Respondents satisfied that duty.

The Ninth Circuit first stated generally that the Fourth Amendment right to be free from arrests without probable cause is clearly established and specifically held that "it is clearly established that a person's Fourth Amendment rights are violated if the sole basis for his arrest is his challenge to the officer's authority absent a warrant." *Gasho*, 39 F.3d at

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[7] The Petitioners attempt to confuse this issue by directing attention to whether the law was clearly established that the seizure of a vehicle did not include the contents of the vehicle. Whether the seizure includes its contents is not the issue. Under this Court's analysis in *Anderson*, the issue was whether the constitutional right asserted by the Gashos was clearly established and whether a reasonable Customs agent could have believed that Sharon Gasho knew the logbooks were seized with the aircraft.

1439 (Petitioner's Brief at p. 32a). The Ninth Circuit recognized that the heart of the issue was whether the Customs Agents should have known that probable cause was obviously lacking when the reason for the arrest was the arrestee's verbal challenge of the Agents' authority to effect a seizure or arrest.

Defendants, with an apparent recognition that their argument that the Ninth Circuit applied only general constitutional standards was contrary to the text of the opinion on its face, then argue that the Ninth Circuit, in assessing what is clearly established law relied on irrelevant and inapplicable law.

In both its discussion on probable cause and qualified immunity, the Ninth Circuit cited ample authority demonstrating that the law was well settled on this point. The Petitioners make a weak assertion that such law was not clearly established at the time of the arrest because the cases holding that passive refusal of a search or seizure is a clearly established constitutional right are not factually identical to the situation the Customs Agents were presented with. It is important to stress that the Customs Agents had *no* statutory authority for the arrests. The very wording of the statutes cited by the Petitioners as justification for the arrests precludes application of those statutes to the conduct of the Gashos. That alone gave the Agents knowledge that there was a lack of probable cause for the arrests and thus the arrests violated the constitutional rights of the Gashos.

Additionally, the passive refusal to turn over property for a warrantless seizure, had previously been held by the courts

to be an improper reason for arrest. In fact, in 1978, the Ninth Circuit held exactly that: "The passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978).

Petitioners argue that the Ninth Circuit was wrong in holding that this law was clearly established because the *Prescott* case was not factually similar enough. *Prescott* arose out of a passive refusal to allow a warrantless search at an apartment, while here the arrests occurred as a result of the passive refusal to allow a warrantless search of a car and warrantless seizure of the logbooks which were in that car. The Ninth Circuit expressly stated that while there is a lower expectation of privacy when searches involve automobiles rather than houses, "the citizen nevertheless retains the right to refuse consent to a warrantless search of the bag containing his personal effects, even if consent is given to search the vehicle." 39 F.3d at 1432 (Petitioners' Brief at pp. 17a-18a) (citing *Florida v. Jimeno*, 500 U.S. 248, 252 (1991)). The holding in *Prescott* was squarely on point. The Petitioners here argued that the refusal to return the logbooks was evidence of Sharon Gasho's specific intent to prevent the seizure when she moved the logbooks. The defendants in *Prescott* argued that the plaintiff's passive refusal to allow entry into her apartment for a search was evidence of the plaintiff's intent to harbor a criminal. The court held in *Prescott* that such passive, privileged conduct could not be offered as evidence of intent because it would place an unfair and impermissible burden on the assertion of a constitutional right. *Prescott* 581 F.2d at 1350-51.

The Ninth Circuit's ruling that the constitutional right to passively refuse a warrantless search or seizure was well established is also based on this Court's holding in *Houston v. Hill*, 482 U.S. 451, 462-63 (1987). *Hill's* holding was on point and constituted clearly established law upon which the customs officers should have based their actions. This Court's statement in *Hill* that "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state" should certainly serve as a guideline for law enforcement officers.

Finally, the Ninth Circuit cited *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) as additional support of its holding[8]. *Gasho*, 39 F.3d at 1437 (Petitioners' Brief at p. 31a). The *Duran* Court followed this Court's holding in *Hill* and held that no reasonable officer could have believed there was probable cause to stop the vehicle of an individual merely because the individual had challenged his authority by verbally insulting and making obscene gestures at the officer as his car passed the officer's. The focus in *Duran* was not, as Petitioners argue, the First Amendment right to free speech, but rather was the Fourth Amendment right to be free from unreasonable search and seizure.

Petitioners argue that a reasonable law enforcement officer who was fully aware of *Hill*, *Duran* and *Prescott*

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[8]The Defendants point out that *Duran* was decided after the Gashos' arrest. *Duran*, however, did not establish new law, but merely recognized already clearly established rights.

would not know that the arrests violated the constitutional rights of the Gashos. That argument is outrageous. The holdings and pronouncements of the courts in those cases are precisely on point and leave no question that the arrest for a passive refusal to allow entry into a vehicle and/or turn over property for seizure violated a clearly established constitutional right. That Customs agents who make decisions every day regarding people's personal liberty and freedom and who are empowered to deprive a person of that liberty and freedom would not be cognizant of that law is a frightening thought for law abiding citizens such as the Gashos. If these officers were to be immune from liability for their wrongful arrests merely because a case factually identical had not yet been published, law enforcement officials would have unfettered power to act unreasonably in all but the most common scenarios.

Having held that it is clearly established that a person's Fourth Amendment rights are violated if the sole basis for his arrest is his challenge to the officer's authority absent a warrant, the Ninth Circuit turned to the second step of its inquiry. Relying on this Court's analysis in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), the Court considered whether a reasonable Customs agent could have believed that the arrests of the Gashos were lawful in light of clearly established law and the information the arresting agents possessed. 39 F.3d at 1439 (Petitioners' Brief at p. 32a). The Ninth Circuit recognized that its holding that probable cause was lacking for the arrests was not determinative because under the qualified immunity doctrine the agents would be immune if they mistakenly believed there was

probable cause to arrest the Gashos if they could have reasonably believed that their actions were lawful. *Id.*[9]

The Ninth Circuit held that the Agents failed to demonstrate that a reasonable Customs agent could have believed that the Gashos' arrests were lawful. *Id.* The Ninth Circuit carefully analyzed both grounds which the Agents cited as justification for the arrests--the removal of the logbooks and the refusal to turn the logbooks over upon demand. *Id.* As discussed by the Ninth Circuit in its analysis of the probable cause issue and in the qualified immunity discussion, there was no probable cause to arrest the Gashos under 18 U.S.C. §§ 2232 or 2233, the statutes cited by Petitioners for the arrests. *Id.* at 1427-1432 (Petitioners' Brief at pp. 7a-18a).

18 U.S.C. § 2233 prohibits forcible rescue of property which has been seized. The Ninth Circuit recognized that ample case law as well as the language of the statute itself made clear that the offense required: (1) knowledge that the property was seized; (2) knowledge that removal was unlawful; (3) forcible and willful removal of the property from the dominion and control of the government; and (4) specific intent to frustrate the seizure. 18 U.S.C. § 2232 prohibits physical interference with a search. It is concerned with the destruction or removal of property before it is seized and requires a specific intent to prevent a seizure.

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[9] Petitioners' attempt to discredit the Ninth Circuit by reference to this Court's reversal of the Ninth Circuit in *Hunter v. Bryant*, 502 U.S. 224 (1991), is unwarranted. The Ninth Circuit in the case at bar followed the *Hunter* decision and used the identical test set forth in *Anderson* and quoted in *Hunter*.

Sharon Gasho was given permission to enter the plane and remove her belongings, the logbooks were in no way secured by Customs, the Gashos were not advised that the logbooks were seized, and the agents did not attempt to prevent Sharon Gasho from moving the logbooks from the airplane to her attorney's car even though they were aware she did so. Based on these undisputed facts, the Ninth Circuit found that there were no grounds to support a belief that the Gashos had the specific intent required by the statutes. 39 F.3d. at 1439 (Petitioners' Brief at p. 32a). Alternatively, if the Gashos were arrested for their refusal to return the logbooks upon demand, a reasonable officer would have known their conduct was privileged and could not serve as a basis for finding intent.[10]

The Ninth Circuit held that the passive refusal to hand over property cannot be grounds for inferring criminal intent because the Fourth Amendment gives citizens the right to refuse to consent to warrantless searches and seizures. *Id.* at 1427-1432 (Petitioners' Brief at pp. 7a-18a). Later, in discussing this same issue in the context of qualified immunity, the court pointed out that this proposition is a matter of clearly established constitutional law. *Id.* at 1438-1439 (Petitioners' Brief at pp. 31a-32a). "It is clearly established that a person's Fourth Amendment rights are violated if the sole basis for his arrest is his challenge to the officer's authority absent a warrant." *Id.* at 1439 (Petitioners' Brief at p. 32a).

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[10] The Gashos' refusal was based upon the advice of their attorney at the time.

Petitioners' argument that the Ninth Circuit applied only general and irrelevant principles of constitutional law is frivolous. The Ninth circuit applied the analysis established by this Court. The constitutional right to passively refuse consent to a warrantless search is obviously neither general nor irrelevant.

II. THE PETITION FOR WRIT OF CERTIORARI WAS FILED SOLEY TO DELAY PROCEEDINGS LONG ENOUGH TO BAR THE *BIVENS* CLAIMS.

Petitioners filed their Petition for Writ of Certiorari not because they believed that this matter was worthy of review by this Honorable Court, or with even a remote expectation that it would be granted. Rather, the Petition for Writ of Certiorari was one step in a clever but unsuccesful plan by Petitioners to delay proceedings on remand to the district court until judgment was entered in the FTCA action so they could then invoke the judgment bar of 28 U.S.C. § 2676.

A major issue in the appeal to the Ninth Circuit was the application of 28 U.S.C. § 2676. In its opinion, the Ninth Circuit determined that if a judgment was entered in the FTCA action, whether in favor of or against the United States on the FTCA claims, § 2676 would act as a complete bar to the Gashos' *Bivens* claims. 39 F.3d at 1437-1438 (Petitioners' Brief at pp. 27a-30a). The Ninth Circuit ruled that, "because we have reversed the district court's summary judgment on the FTCA claim involving the arrest, a prior 'judgment' no longer bars the subsequent *Bivens* claim on the arrest. Thus, the Gashos are permitted to pursue either the *Bivens* claim or FTCA claim, or both claims. If they pursue

both remedies in separate actions, they may secure judgments on both claims only if the *Bivens* judgment is entered first." 39 F.3d at 1438.

Following remand, the Gashos elected to pursue both the FTCA and *Bivens* claims and sought and obtained an order of the district court consolidating the *Bivens* and FTCA claims for discovery and a contemporaneous trial. The district court's decision to consolidate the actions prevents the Petitioners from intentionally delaying trial of the *Bivens* action until after trial and judgment in the FTCA action. Unable to do so in the district court, Petitioners attempted to delay the *Bivens* action in the appellate courts.[11]

A stay of proceedings pending petition for writ of certiorari is normally requested before the mandate issues. Had Petitioners, however, sought a stay of the action before January 11, 1995 (the date the mandate was issued), they would have had only until February of 1995 to petition for writ of certiorari.[12]

A Petition for Writ of Certiorari filed in February would likely have been decided before the end of this court's October 1994 term in June. The district court has indicated that at the June scheduling conference it will set both actions for trial. Thus, if Petitioners had timely requested a stay of the *Bivens* claims, there probably would not have been a long

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[11] The United States has not joined in this Petition and the agents request review of only the *Bivens* claim.

[12] Federal Rule of Appellate Procedure 41(b) provides that a stay is only in effect for 30 days unless the petition for writ of certiorari is filed.

enough delay for the FTCA action to result in a judgment in the interim. Instead, Petitioners did not request a stay before the mandate was issued but rather waited four months after the mandate was filed to request a recall of the mandate and a stay. The Petitioners then sought a 60-day extension of time for filing the Petition, which, if granted, would have resulted in the Petition being filed on May 26, 1995, and the responsive brief being due at the end of June, guaranteeing that the Petition would not have been decided until the October 1995 term, after the trial on the FTCA action.[13]

It did not matter to Petitioners' plan that the Petition would be denied. Had the Ninth Circuit granted a stay, the Petitioners would have succeeded in barring the *Bivens* claim even though the Petition was denied. The only way the Petitioners could request a stay from the Ninth Circuit was to file a Petition for Writ of Certiorari, which they did without regard to the merits of the Petition.

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[13]Petitioners were unsuccessful. First, this court only granted a 30-day extension for filing the Petition, and on May 15, 1995, after their Petition was filed, the Ninth Circuit denied their request to recall the mandate and stay the *Bivens* portion of the action pending a decision from this court.

CONCLUSION

There was no error in the Court of Appeals' decision and further review by this Court is not warranted. Respondents respectfully request that the Court deny the Petition for Writ of Certiorari and award Respondents just damages and double costs pursuant to Rule 42.2, Rules of the Supreme Court of the United States, for responding to the Petition.

Respectfully submitted,

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Dated: Phoenix, Arizona, May 30, 1995.